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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1093

UNITED STATES OF AMERICA,
Appellant,

vs.

PHILLIPSBURG NATIONAL BANK AND TRUST COMPANY, SECOND NATIONAL BANK OF PHILLIPSBURG, and WILLIAM B. CAPP, Comptroller of the Currency,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

BRIEF FOR APPELLEES, PHILLIPSBURG NATIONAL BANK AND TRUST COMPANY AND SECOND NATIONAL BANK OF PHILLIPSBURG

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TABLE OF CONTENTS

	PAGE
STATEMENT	1
PROCEDURAL HISTORY	2
THE FACTS	4
History of Defendant Banks	4
Industrial and Population Growth in the Lehigh Valley	7
Defendant Banks' Geographic Area	8
The Intervenor's Trading Area	9
The Plaintiff's Trading Area	9
ABE-SMSA	10
Permissible Area For Branching	11
Factors Affecting Parameters of Geographic Market	13
Geographic Distribution of Banking Customers	13
Restrictive Bank Policies	13
Solicitation by Banks	16
Banking by Mail	18
Newspaper Circulation and Radio Coverage	19
Commuting Patterns	20
Commuting Time	21

PAGE

Willingness to Cross State Boundaries and Traffic Patterns 22

Shopping Patterns and Deliveries 25

Market Area for Other Services 26

The District Court's Evaluation of the Market .. 26

Product Market 28

Activities of Financial Institutions 29

Savings & Loans 30

Savings Banks 30

Insurance Companies 31

Credit Unions 33

Finance Companies 34

Mutual Funds and the Stock Market 36

Department Store Operators 37

Other Competitors 38

The District Court's Opinion As To Product Market 39

Competitive Effect 41

Convenience and Needs 41

Managerial Resources 41

Salaries of Present Officers 44

Intention to Hire Specialists 45

Cost of Required Officers 45

PAGE

Factors Making Recruitment Impossible 45

The Three Specialists 46

Impossibility of Hiring Without Merger 46

The Trust Officer 48

The Mortgage Loan Officer 49

The Commercial and Industrial Loan Officer 50

The Increased Lending Limit 50

Benefits Resulting from Hiring a C & I Specialist 51

Problems with Participations 52

Benefits Resulting from Increased Lending Limit 52

Impossibility of Specializing Without Merger 54

Benefit from Hiring Specialized Officers 54

Increased Competition for Modern Banking Services 54

Other Benefits 55

Automation and Economies of Scale 55

Economies of Scale 56

Operation of Five Present Offices 57

New Branches 57

The District Court Opinion on Conveniences and Needs 57

INTRODUCTION AND SUMMARY OF ARGUMENT 59

PAGE

I—The Product Market Delineated By The District Court Is The Relevant Market For These Two Small Banks 64

A. The District Court used commercial banking factors to evaluate competitive effect .. 65

B. The facts fully support the inclusion of other financial institutions in the market 67

C. The Bank Merger Act of 1966 allows the fact finder to consider the influence of other financial institutions in determining the relevant product market 74

D. The traditional antitrust analysis supports the Court's delineation of the market in this local area 81

II—The Trading Area Delineated By The District Court Is The Appropriate Section Of The Country Within Which To Evaluate The Merger 83

A. Justice has distorted the language of Philadelphia National Bank in an effort to define a narrow geographic market for defendant banks 84

B. Abundant testimony supports the trading area determined by the District Court 85

C. The small areas chosen as plaintiff's proposed markets do not comprise a "section of the country" 89

D. The evidence would have supported the District Court's choice of a wider market in this case 92

PAGE

III—The District Court's Consideration Of The Convenience And Needs Of The Community To Be Served In The Areas It Selected Showed That The Community Advantage Would Outweigh The Assumed Anticompetitive Effects In Any Of The Trading Areas Chosen By The Parties 93

A. The Decision Of The District Court Is Consistent With The Bank Merger Cases Heretofore Decided By This Court 93

B. The District Court Applied Standards Consistent With The BMA '66 95

C. The Pro-Competitive Factors—Namely The Ability Of The Merged Bank To Compete With The Largest Banks In The Frst Banking District—Support The Conclusions Reached By The District Court 103

IV—There Are No Alternatives To Merger To Solve The Managerial Problems Of Second National And To Obtain The Benefits Resulting From The Merger 105

CONCLUSION 113

Cases Cited

Brown Shoe Company v. United States, 370 U. S. 294 (1962) 62, 81, 85, 90, 91

Hudson County National Bank v. Provident Institution for Savings, 44 N. J. 282, 208 A. 2d 409 (1965) 68

Tampa Electric Co. v. Nashville Coal Company, 365 U. S. 320 (1961) 87

PAGE

United States v. Continental Can Co., 378 U. S. 441 (1964) 81

United States v. Crocker-Anglo National Bank, 277 F. Supp. 133 (N. D. Calif. 1967) 75, 77, 78, 81, 82

United States v. First National Bank of Jackson, 301 F. Supp. 1161 (S. D. Miss. 1969) 69fn, 82, 102

United States v. First National Bank of Maryland, CCH Trade Cases §173.061, 88 (D. Md. 1970) 82, 83fn

United States v. First City National Bank of Houston, 386 U. S. 361 (1967) 75fn

United States v. Philadelphia National Bank, 374 U. S. 321 (1963) 22fn, 61, 61fn, 65, 67, 67fn, 68-71, 84-87, 87fn, 88, 89, 91, 93, 94, 97, 99

United States v. Provident National Bank, 280 F. Supp. 1 (E. D. Pa. 1968) 82

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Clayton Act:

Sec. 7 ..... 2, 74, 75, 85

N.J.S.A. 17:9A-19 ..... 11, 84, 103

N.J.S.A. 17:12B-26 11

N.J.S.A. 17:9A-26(1) 68

N.J.S.A. 17:9A-345 ..... 84, 103

Sherman Act 74

PAGE

The Bank Merger Act (1966):

12 U.S.C.:

Sec. 1828 3

Sec. 1828(c)(4) 2

Sec. 1828(c)(5)(A) and (B) 76

Sec. 1828(c)(5)(B) 75, 111

Sec. 1828(c)(7)(D) 3

15 U.S.C.:

Sec. 18 2

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2456 97

2457 ..... 98, 99

2655 (1966) 79, 80

2663 100

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441 ..... 72fn

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41-47 ..... 70fn

PAGE

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176 71

177 72

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3 99

4-5 78

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p. 14 ..... 84fn

Wallich, "Banks Need More Freedom To Compete" Fortune (March, 1970) 72fn

114, 140, 143 73

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Statement

This appeal involves a challenge by the Justice Department to the merger of two small banks, the Phillipsburg

National Bank and Trust Company (hereinafter "Phillipsburg National") and the Second National Bank of Phillipsburg (hereinafter "Second National"). The district court in its opinion approving the merger found that "[e]ach of the defendant banks is a very small bank and the resultant bank will be a small bank." (A. 675). As of year-end 1967 Phillipsburg National had assets of less than $24 million and Second National had assets amounting to $17.3 million (A. 684).

Procedural History

Application to merge Second National into Phillipsburg National was made to the Comptroller of the Currency on May 1, 1967. Other bank agencies and the Justice Department were duly notified (12 U. S. C. §1828(c)(4). A hearing on the matter was held before the Comptroller on August 14, 1967. Justice did not appear at the hearing. On December 18, 1967, the Comptroller, after considering the testimony of witnesses, the application to merge and all agency recommendations, approved the merger, finding that it would be in the public interest.

On January 16, 1968, the Attorney General filed a Complaint claiming that the proposed merger violated section 7 of the Clayton Act (15 U. S. C. §18) when viewed in two markets—Phillipsburg and "environs" and Phillipsburg-Easton and "environs" (Pl. Ex. 1; R. 85)—markets that the district court was later to characterize as "narrowly drawn." (A. 681) These markets, after interrogatories were submitted by defendant banks, were later defined to include Phillipsburg and the four nearby municipalities and Phillipsburg-Easton and the 12 neighboring municipalities (Pl. Ex. 1, R. 85).

In the Answer the defendants denied the allegations of the Complaint and claimed that the relevant trading area

was the Allentown-Bethlehem-Easton Standard Metropolitan Statistical Area (ABE-SMSA) with the addition of nearby portions of Bucks County in Pennsylvania and Hunterdon County in New Jersey (Defs'. Answer ¶1; A. 8). Defendants alleged that the product market included the activities of various financial institutions involved in the borrowing and lending of money. The banks also alleged the affirmative defense provided by the Bank Merger Act of 1966 (hereinafter BMA '66), claiming that the convenience and needs redounding to the benefit of the community would clearly outweigh any anticompetitive effect (12 U. S. C. §1828).

Pursuant to the provisions of BMA '66, the Comptroller of the Currency intervened "as of right." (12 U. S. C. §1828(c)(7)(D)) He filed an Answer denying the allegations of the Complaint.

Thereafter, extensive interrogatories were submitted by the Justice Department to the defendant banks. With much effort and expense the two small banks answered the voluminous questions.

An eleven-day trial was had before the United States District Court for New Jersey, Judge Shaw sitting. At the trial some 35 witnesses appeared and testified; more than 175 exhibits were submitted by the parties.

On October 20, 1969, the decision of the district court approving the merger was entered on the docket (A. 1). An appeal followed. Plaintiff had previously moved for an extension of the statutory stay and by order of the district court the stay was extended during the pendency of this appeal (A. 1). Additionally, plaintiff's motion to reopen the record for the submission of evidence as to the effect of the revised New Jersey banking statute was granted and the district court found that the additional evidence corroborated its findings (A. 579, 593).

The Facts

History of Defendant Banks

Phillipsburg National was incorporated in 1856 and converted to a national bank in 1865. At present its main office is located on South Main Street in the Town of Phillipsburg, County of Warren (Complaint ¶3, 12; A. 4, 5; Defs. Answer ¶4, 13; A. 8, 10). Its two branches are located in the Borough of Alpha and in the Hillcrest Shopping Center on Route 22 in Lopatcong Township (Pl. Ex. 53; R. 414, A. 642; Complaint ¶3, A. 3; Defs'. Answer ¶4, A. 8).

Second National was organized as a national bank in 1900. The main office is situated on South Main Street in Phillipsburg. Its branch is on Roseberry Street on the eastern edge of Phillipsburg (Complaint ¶3, A. 3; Defs'. Answer ¶4, 13, A. 8, 10; Pl. Ex. 54; R. 414; at p. 6).

Neither of the defendant banks throughout the entire history of their operations has been involved in a merger. Nor have they participated in a consolidation or bulk purchase of the assets of another bank (Pl. Ex. 17; R. 85).

The merger agreement entered did not call for a premium being paid for the stock of either bank (A. 154-55, 380. As William F. Greenley, a senior vice president of Fidelity Union Trust Company in Newark who had aided in the early negotiations, testified:

> As a matter of fact, I think just on the statistical basis the actual settlement came down pretty close to what you would have done just doing it on a pen and pencil basis. (A. 154-55)

The terms arrived at by these two banks were, as Furman Denton, executive vice president and cashier of the First National State Bank of New Jersey, said:

> . . . eminently equitable . . . there did not appear to be a premium. And the sole objective appeared to be to put together two banks on a proportionately equal basis. (A. 380)

The Town of Phillipsburg lies immediately across the Delaware River from the City of Easton. The town's population figure of 18,500 has remained almost the same over the last 15 years (A. 262). No land for development remains in Phillipsburg and, as a result, the growth has been in the surrounding area (A. 262). The downtown area has deteriorated and the stores are moving out (A. 291-92). Characterizing the area in which the main office of each bank is located, Furman Denton said:

> I would think of them as being down on the corner of Mulberry Street and somewhere else. It is right near Skid Row. And certainly there is a lack of modern buildings around it, lack of parking. (A. 155)

The whole of the downtown commercial area might be covered in a fifteen-minute walk (A. 222). So limited is the variety of goods offered by the stores in Phillipsburg that one cannot purchase a man's suit there (A. 287). Until the Hillcrest Shopping Center opened, anyone buying shoes would have to settle for a low-grade pair (A. 292). One owner of a general food store in downtown Phillipsburg who now has other stores in the surrounding communities contemplates closing the downtown store because of the absence of demand (R. 1348). An urban renewal plan for the area was defeated by the voters (A. 292).

Easton, across the river, shares some of these problems. As one general contractor put it:

> . . . we have tremendous growth outside of the City of Easton, because the City of Easton is the same as the Town of Phillipsburg. They are stagnant. They have gone through the process and there has to be either urban renewal or complete demolition to start anew. (A. 319)

William F. Jones of Easton National Bank & Trust listed some of the industries in Phillipsburg and Easton; he noted that Ingersoll-Rand is probably the largest single plant located in Phillipsburg and that it employs between three and four thousand people (A. 137). Also located in Phillipsburg are Baker Chemical and Shahmoon Industries (A. 137, 336-37). Dixie Cup and American Can are among the large companies located in Easton. Industrially, Phillipsburg and Easton have grown in the last five years with new plants having been built by companies like ITT&T, Fairmont-Lavalle, S.I. Handling Systems, and Lavalette Corporation (A. 138).

The growth areas are outside Phillipsburg and Easton. As Louis Hajdu, a general contractor in the area, stated:

> The growth of this 40-mile radius seems to be hinged to the fact that we are getting Route 80 and Route 78 through to our area at the present time. It is mostly pretty well done, and the growth is in all of the outlying areas. Belvidere is going to have tremendous growth with Hoffmann-LaRoche coming in. Hackettstown has almost tripled in size in the past few years. Washington has started. Phillipsburg itself seems—now seems to be very, very quiet. Lopatcong Township has doubled if not tripled in the past ten years. Hopatcong Township [sic] has a tremendous growth gain. Alpha is

> just about done because they have not any place else to grow. They have developed practically to the borough limits, and again in Pennsylvania we have tremendous growth outside of the City of Easton, . . . (A. 319)

Movement of the banks in the Town of Phillipsburg reflects this change. The Phillipsburg Trust Company, N.A., formerly on Main Street, has removed its main office to Memorial Parkway, Route 22 (A. 41). Meanwhile, Phillipsburg National has opened branches in the Hillcrest Shopping Center and in Alpha, and Second National has opened a modern office on Roseberry Street, the eastern edge of the town. Opened in 1964, the Hillcrest Branch of Phillipsburg National by 1968 had $5.5 million in deposits. Its Alpha branch had some $3 million in time deposits (A. 263).

Industrial and Population Growth in the Lehigh Valley

Industrial growth in the area is evidenced by the increase in the number of businesses now experiencing a need for more credit and larger lending limits on the part of the area banks (A. 249, 277-78, 303, 315-16, 338-39, 353-54, 375, 418-19; 429; R. 997). The construction of Routes 78 and 80 in Warren and Hunterdon Counties in New Jersey and the westward shift of industry in New Jersey in response to the enhanced opportunities for motor transportation show the growth potential of the area (R. 1025). Any traveler on the roads between Washington and Allentown can see the increasing development of new industry and the concomitant construction of new housing developments and multiple housing units (R. 282, 375). The largest employer in the Lehigh Valley area is Bethlehem Steel (R. 505). In the Hope-Belvidere area of

New Jersey the Hoffmann-LaRoche Company has been expanding its operations (R. 506, A. 263, 387). Pearsall Chemical Company in Harmony has been growing about 30% a year (A. 359). In Warren County the growth areas have been to the northwest of Phillipsburg in Harmony, Lopatcong, Greenwich and White Townships (A. 261-62). To the southeast, Pohatcong, Bloomsbury and northwest Hunterdon County have also been growing (A. 261-62). The Riegel Paper Company in Milford has grown steadily and it is expected this growth will continue (A. 337).

Looking to the areas outside Phillipsburg, Easton and Bethlehem, the district court found that they are "sparsely populated but progressing rapidly in development from farm lands to home development and industrial and commercial enterprise." (A. 679) The court found industry and commerce moving out of the populated areas. The banks in response to that movement were, the court found, establishing offices beyond the city limits "to service the needs of a rural community that is growing rapidly in transition from an agricultural economy to commercial and industrial." (A. 680)

Defendant Banks' Geographic Area

Defendant banks designated the following as their trading area:

> . . . all of Warren County, New Jersey, the northwestern portion of Hunterdon County, New Jersey (Alexandria Township, Bethlehem Township, Bloomsbury Borough, Clinton Town, Clinton Township, Flemington Borough, Franklin Township, Frenchtown Borough, Glen Gardner Borough, Hampton Borough, High Bridge Borough, Holland

> Township, Kingswood Township, Lebanon Borough, Milford Borough, Raritan Township and Union Township), all of Northampton County, Pennsylvania, all of Lehigh County, Pennsylvania, and that portion of Bucks County, Pennsylvania, within 15 miles of the Town of Phillipsburg, New Jersey. (Defendants' Answer, ¶1, A. 8)

On defendants' case, bankers and businessmen from this area described the growth in the area. They testified that the Lehigh Valley area (as it is often referred to by plaintiff's attorneys in the record) is an economically integrated and significant area and that it serves as a banking market as well as the market for the distribution of many other goods and services.

The Intervenor's Trading Area

The Comptroller alleged two trading areas. "Trading Area A," as it has been delineated in the exhibits submitted by the Comptroller, parallels that chosen by defendants; "Trading Area B" excludes all of Lehigh County except Allentown. Allentown borders on Bethlehem in Northampton County.

The Plaintiff's Trading Area

The Justice Department, in response to the interrogatories submitted, defined Phillipsburg and "environs," one of its proposed areas, to include Phillipsburg and the Townships of Lopatcong, Pohatcong, and Greenwich, and the Borough of Alpha; Phillipsburg-Easton and "environs" was defined to include, in addition, Easton, the Townships of Forks, Williams and Palmer, and the Boroughs of Wilson, West Easton, Glendon, Stockerton, and Tatamy, all in Northampton County, Pennsylvania (Pl.

Ex. 1; R. 85). The population of Phillipsburg and environs was 28,500 in 1960; Easton and environs then had a population of approximately 60,000 (A. 115-16, 678-79).

ABE-SMSA

Full understanding of the competitive factors in this case also requires the consideration of two additional areas. One of these, the Allentown-Bethlehem-Easton, Pa.-N. J. Standard Metropolitan Statistical Area (often referred to by witnesses as the "ABE area" or the "SMSA") has been chosen by the Bureau of the Budget as constituting an economically and socially integrated area. It is one of 224 such areas designated throughout the United States. It includes Lehigh and Northampton Counties in Pennsylvania and Warren County in New Jersey. Defining the characteristics of such an area the Bureau states:

> 'The criteria of integration relates primarily to the extent of economic and social communication between the outlying Counties and central County. A County is regarded as integrated with the County or Counties containing the central cities of the area if either of the following criteria is met:
>
> Fifteen percent of the workers living in the County work in the County, or Counties containing central cities of the area; or twenty-five percent of those working in the County live in the County or Counties containing central cities of the area.' (A. 497)

However, where working population data are not conclusive (it was conclusive in the ABE area), the Bureau would then look to the following: (1) telephone calls in the area, (2) newspaper circulation, (3) retail store charge accounts, (4) retail store delivery services, (5)

official traffic counts, (6) public transportation facilities, and (7) local planning groups (A. 497). Primary data as to these factors were produced by the defendant banks, both in support of the Bureau's determination and in support of the claim that portions of Bucks and Hunterdon Counties were within the market of defendant banks.

Standard Metropolitan Statistical Areas were used by Franklin Edwards, plaintiff's economist, in evaluating certain banking factors (A. 217-18). None of the areas he studied was as small as Phillipsburg and environs or Phillipsburg-Easton and environs in terms of the number of banks and the population of the area (A. 218). The ABE-SMSA itself has one of the lowest concentration ratios among the SMSA's where branch banking is allowed; the largest bank in the SMSA has 17.7% of the total deposits, the three largest have 39.14%, and the five largest 53.8% (Defs'. Ex. 8; R. 776; A. 794-97). After merger, the percentage of bank deposits in the ABE-SMSA held by the largest bank, the three largest and the five largest will be wholly unaffected (Def. Ex. 8; R. 776; A. 794).

Permissible Area For Branching

The other area to be considered is the new seven-county banking district in New Jersey, including Warren, Hudson, Essex, Passaic, Morris, Sussex and Bergen Counties (N.J.S.A. 17:9A-19). These counties now form the First District in New Jersey. Throughout this District, the most populous in the State, branching and merger of commercial banks, savings banks and building and loans are permitted (N.J.S.A. 17:9A-19, N.J.S.A. 17:12B-26). Before the passage of the new law in 1968, there were 22 applications for branches in the counties making up this district; in the first nine months of 1969, there were 119

branch applications, or over five times as many.* Within that district Phillipsburg National ranks 44th with .37% of the total deposits and Second National ranks 58th with .24% of total deposits; together they would have six tenths of one per cent of the total deposits (Int. Ex. 30; A. 581, A. 869).

Already, large and substantial Newark banks have begun to move into Warren County. The National Newark & Essex Bank, third largest in the district, headquartered in Newark and holding total deposits of over $579 million, has obtained approval of a merger with the Washington Trust Company, Washington, New Jersey, with deposits of $16 million and with branch offices in Oxford and White Townships. Peoples Trust Company of New Jersey, fourth largest, headquartered in Hackensack and holding total deposits of over $502 million, has filed an application to merge with Peoples National Bank of Hackettstown, a bank holding $19 million in deposits (Int. Ex. 30; A. 581, A. 871). The holding company associated with the First National State Bank of New Jersey, ranked first in the district and itself holding deposits of $659 million, is in the process of acquiring as an affiliate the Warren County National Bank, which has offices in Hackettstown and Washington.

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* When submitting its report to the Comptroller with regard to the proposed merger of the Washington Trust Company, Washington, New Jersey, into the National Newark & Essex Bank, Newark, New Jersey, the Justice Department fully recognized the significant changes in the market which the new law had produced and there stated that the merger would not have any significant effect on existing and potential competition. The Justice Department then clearly stated that "[t]he recent broadening of the geographic boundaries of permissible branch office operation by commercial banks in New Jersey has induced substantial market extension activity, both by *de novo* branching and by merger." (Int. Ex. 30; A. 581, A. 889-90)

The only two banks in Hackettstown and the only two banks in Washington, as a result, will be associated with some of the largest banks in the District and State. Similarly, the the Carteret Savings and Loan, as a result of the acquisition of a Phillipsburg building and loan, has opened an office in downstown Phillipsburg. Carteret is building a new office in the immediate vicinity of the Hillcrest Shopping Center in Phillipsburg on Route 22, a short distance from the branch of Phillipsburg National in Lopatcong Township.

Factors Affecting Parameters of Geographic Market

Geographic Distribution of Banking Customers

Many bankers testified that their customers were drawn from a 20-30 mile radius around the bank. Robert Leupo, executive vice president of Phililpsburg Trust Company and the first witness called by the Justice Department, stated that his bank did business in "a radius of 25 miles at this time." (A. 43). Clark Bowers, president of the Washington Trust Company of Washington, New Jersey, also called by plaintiff, stated that his trading area extended 20 miles from the bank (A. 70). Lester Pursell, executive vice president of Second National, estimated that the bank did business within a 25-mile radius of Phillipsburg (Pl. Ex. 84; R. 1526, A. 657). The President of Phillipsburg National, Harold J. Curry, felt that his bank could compete effectively within a 25-mile radius of Phillipsburg (Pl. Ex. 53; R. 414, at pp. 205-06). The President of the Hunterdon County National Bank testified that his service area extended some 23 miles from the bank (A. 483).

Restrictive Bank Policies

Troy Rhoades, president of the Nazareth National Bank with offices in Nazareth and Forks Township, exemplified

the conservative attitude of some bankers in the area, stating that he would not solicit in the Easton area:

> ". . . they have enough banks there to take care of their own business. They do not come into our territory, we don't go into their territory." (A. 81)

Nazareth is six and one-half miles from Phillipsburg; Easton, as the district court found, is one mile from Phillipsburg (Def. Ex. 33; R. 776; A. 813; A. 679). Mr. Rhoades admitted on cross-examination that most bankers would disagree with his concept of the banking business and that he was in the minority in this regard (A. 89). On redirect he agreed that there were no particular difficulties in a bank's serving a geographic radius of 30-40 miles (A. 92-93).

Also to be included in this conservative group of bankers is William F. Jones, president of the Easton National Bank and Trust Company. A colloquy with the judge demonstrates this attitude:

> The Witness: We have not aggressively sought business in Bethlehem or Allentown, or areas beyond our defined business area.
>
> The Court: Is there any reason peculiar to policy of your bank, up to this time, which caused you to concentrate in the area that you have just defined in answer to a previous question? That is, as far as seeking business is concerned, aggressively seeking business.
>
> The Witness: Perhaps peculiar to the banking picture, we have an area in which we are doing business, and other institutions in other areas have an area in which they are doing business. And I daresay that if we sought business in Bethlehem or

> Allentown, or wherever, Bethlehem and Allentown, or whomever, may be seeking business in our area.
>
> The Court: A friendly relationship, isn't there?
>
> The Witness: No agreement, however.
>
> The Court: That is understandable. I can appreciate the fact that I am going to have a real problem here in deciding the degree to which competition presently exists. (A. 132)

Based on the attitude of these and other bankers, Judge Shaw in his opinion stated:

> It seems from the evidence that most of the small banks in the area have not been interested in building up banking services except to the extent that aggressive competitors led the way. An ultraconservatice policy of banking seems to have been prevailing with reluctant change occurring only when profits and future growth were threatened by virulent competitors. There is an attitude of complacency on the part of many banks. They are content to continue outmoded banking practice and reluctant to risk changes which would improve service and extend services over a greater area to a larger segment of the population. (A. 688)

Charles Langner, the president of the First National Bank of Belvidere, a bank whose policy is evidenced by the fact that his loans amount to only 28% of his total deposits (A. 565), stated during direct that his banking radius was some 10 to 15 miles (A. 564). His bank, as his lending policy suggests, did not solicit (A. 563).

Younger more aggressive bankers from the area, like James Greer, the executive vice president of Lafayette Trust, also located in Easton, generally adopted a more expansive definition of their trade area:

> Our immediate trade area is all of Northampton, Warren and Bucks Counties, including the Riegelsville area where the Girard Trust of Philadelphia has a branch, Lehigh County, and some parts of southern Monroe and southern Carbon County to the north of us. (A. 388)

Plaintiff's witness, Reese Jones, president of the First National Bank & Trust Company of Bethlehem, had not gone more actively into Easton because he was "repairing a lot of fences in the Bethlehem area." (A. 103). It was his intention, when ready, to go "as far as we can go" and "anyplace we see a potential." (A. 110) He saw Allentown, Bethlehem and Easton as "getting closer and closer together all the time." (A. 104).

The testimony showed that large banks from Allentown and Bethlehem actively solicit customers in Phillipsburg and that other banks located throughout the trading area delineated by the defendants seek business from the whole of the area (A. 141, 388-90, 457).

Solicitation by Banks

Witnessses associated with the larger banks in the area generally testified that they could, or did, actively solicit business throughout the SMSA. The Union Bank of Bethlehem and The Merchants National Bank of Allentown solicit actively and send bank representatives into Phillipsburg and Easton (Def. Ex. 60; R. 1333, A. 625-26; Pl. Ex. 53; R. 414, A. 633-35; A. 389-90). The Girard Trust Company with an office in Riegelsville, Pennsylvania, has become a significant competitive factor throughout the whole of defendants' trading area; it actively advertises its rates paid on savings and bonds in the Easton Express (Def. Ex. 14; R. 776; A. 805; Def. Ex. 23; R. 776; Def.

Ex. 52; R. 1090), a daily newspaper which, in conjunction with the Allentown Call, serves the whole of the ABE-SMSA. (Def. Ex. 13; R. 776; A. 803; A. 364). The Girard's analysis of the savings bonds held by the Riegelsville office, segregated by customer address, shows that its influence has spread throughout the trading area (Def. Ex. 11; R. 776; A. 801). Of its total of savings and demand accounts and savings bonds, that branch has 20.29% arising from Easton, 9.3% drawn from Phillipsburg, 7.25% from Milford and 1.76% from Alpha (Def. Ex. 11; R. 776; A. 801). Of its savings bonds, 37.16% are drawn from Easton, 12.93% are drawn from Phillipsburg, 4.67% are from Milford and 1.67% from Alpha. (*Id.*)

The district court noted as to statistics such as these:

> These percentages have significance only to the extent that they are considered in conjunction with concentration of population. For example, it would be expected that a higher percentage of deposits and loans would be derived from a heavily populated area of the market than from one that was sparsely populated. But that circumstance would not be a valid reason for moving the small town out of the relevant market. If the ratio of business on a per capita basis were the same or comparable, the small town belongs in the market. Any other approach would exclude most of the suburban areas. (A. 681)

Solicitation by Girard is shown by its direct mail advertisements sent to doctors, lawyers and morticians in Phillipsburg, Nazareth, Martins Creek, Alpha, Washington, Allentown, Bethlehem, Belvidere and Milford (Def. Ex. 27; R. 776). By direct mailing of 9,500 pieces, it has advertised its savings bonds in the Riegelsville, Hunterdon and Warren County areas (Def. Ex. 21; R. 776).

The defendant banks intend, after merger, to hire a commercial and industrial loan officer, a trust officer and a real estate specialist (A. 265; Pl. Ex. 53; R. 414, A. 650). A consumer loan officer, Anthony Stillo, has already been hired by Phillipsburg National (A. 408-09). It has been the contention of defendant banks that the hiring of these additional officers will allow them further to expand their service area.

Commercial bankers recognize that increased size would allow the resulting bank to hire specialized officers and that these officers will naturally seek business farther from their office of operations (A. 142-43, 160; Pl. Ex. 52; R. 414, at p. 132; Pl. Ex. 53; R. 414, A. 648-49). As a result, the merged bank would have the opportunity to expand its geographic market and to compete more effectively in the expanded market (A. 500-01, 530-31).

No bank in Warren County now employs a full-time C & I officer or trust officer (A. 281-82). Those banks from other parts of the trading area employing specialized personnel in these departments do business throughout the SMSA and some of them can solicit more business throughout the SMSA if they choose (A. 99, 109-10, 141-42, 149, 389-90, 462, 467-68, 500-01; R. 1307, Pl. Ex. 52; R. 414, A. 602, 612).

Banking by Mail

Banking by mail has expanded the area of competition among banks (A. 160, 263-64, 559, Def. Ex. 51; R. 1090; A. 825; Def. Ex. 54; R. 1091; A. 826; Pl. Ex. 52; R. 414, at p. 69). The claim has been made by banks like First National of Milford that "there's a red, white and blue drive-up window on almost every corner" (Def. Ex. 51; R. 1090; A. 825).

Newspaper Circulation and Radio Coverage

Edward E. Howard, director of advertising for the Easton Express, was called by the defendant banks to testify as to the market area served. He stated that his circulation was "primarily within a 15 to 20-mile radius" and that the newspaper covered the eastern portion of Northampton County, Warren and Hunterdon Counties (A. 363-64). Together with the Allentown Call, the Easton Express has published a brochure emphasizing the advantage to national advertisers of advertising in their papers if they wish to reach buyers in the ABE-SMSA (A. 365). The SMSA is viewed by these advertisers and by the papers as one unified market (A. 365). Classified ads from Allentown and Bethlehem appear in the Easton Express. Advertisements by The First National Bank of Milford, Girard Trust Bank, The First National Bank and Trust Company of Bethlehem, the Hunterdon County National Bank and the Nazareth Savings and Loan Association are also found in the Easton Express (Def. Ex. 51; R. 1090; A. 825; Def. Ex. 52; R. 1090; Def. Ex. 55; R. 1091; A. 827; Def. Ex. 56; R. 1091; A. 828). Nazareth National advertises its Forks branch in that paper (A. 77). The Valley Federal Savings and Loan, located in Easton, engages in vigorous advertising in the Easton Express (A. 368). That institution also advertises in the Bethlehem Globe Times, the Allentown Sunday Call and the Washington, N. J. papers (A. 275).

Radio station WEEX, an affiliate of the Easton Express, broadcasts to the SMSA and reaches Bucks and Hunterdon Counties (A. 370). There, too, advertisers come from Allentown, Bethlehem and throughout Warren County (A. 370).

The advertising program engaged in by Girard Trust has provoked comment from local bankers who recognized its extensive advertising in local papers (A. 43, R. 492; Def. Ex. 60; R. 1333, at p. 153), on the local radio station (Def. Ex. 25; R. 776) and on the Philadelphia television stations which are received throughout the trading area described in defendants' Answer (Pl. Ex. 52; R. 414, at pp. 63-64).

Commuting Patterns

An analysis of commuting patterns indicates the general mobility of the labor force. People in the area are willing to, and often do, travel greater distances to work than they did in the past; now they travel 25, 30 or more miles to work (A. 45-46, 286-87, 423, 472-73; R. 281). Employees commute from nearly all over the trading area to their jobs at the Riegel Paper Company (Def. Ex. 36; R. 818; A. 814; A. 258-59), Alpha Lehigh Tool Company (A. 352, R. 1058), Pearsall Chemical (A. 357) and Baker Chemical (R. 806, Def. Ex. 38; R. 813; A. 816). Of the 4,248 employees of Ingersoll-Rand, of whom all but 250 work in the Phillipsburg plant, 2,160 were New Jersey residents and 2,088 were Pennsylvania residents (A. 258).

In attempting to show a more limited geographic market, plaintiff relied heavily on a "Journey to Work" document, Exhibit G-47 (Pl. Ex. 47; R. 414). Plaintiff's economist, Franklin Edwards, was not completely satisfied with it (A. 191, 230). The testimony of Emanuel Gnat, the chief of the planning and analysis staff for the Prudential Insurance Co., established that, on the basis of errors made in the sample and corrections which were not made in Pennsylvania and New Jersey, these data were completely invalid if the aim was to show commutation across county boundaries (A. 316-17, 533-34).

Mr. Gnat said that he himself would not use the data to show commutation across county boundaries (A. 533-34). The document itself states that the original data for the tables were "impaired." (Def. Ex. 47; R. 414, at p. X).

Commuting Time

One factor in ascertaining the geographic area within which the effect of the merger is to be judged is the time required to travel by automobile from one community to another; this bears on the accessibility of alternate financial entities. Louis Hajdu, a general contractor with offices in Alpha, testified as to commuting time from his office. Mr. Hajdu based his estimates on actual road time and his prior experience in attending meetings at various points in the area (A. 327-28). Based on this witness's testimony as to the location of his office outside Phillipsburg and four minutes south, the travel time from Phillipsburg is as follows:

Municipality	*Time from Phillipsburg*	*Time from Alpha*
Belvidere	13 min.	13 min.
Forks Township	9 min.	13 min.
Flemington	25-30 min.	26 min.
Washington	11½ min.	11½ min.
Hackettstown	27 min.	27 min.
Nazareth	12 min.	16 min.
Riegelsville	10 min.	6 min.
Milford	18 min.	14 min.
Bethlehem	14 min.	18 min.
Allentown	20-21 min.	25 min.

(A. 260, 327-28, 472; R. 1513).

Corroborating this breakdown are the estimates of Joseph Varga, vice president of Phillipsburg National. He stated that from Phillipsburg to Allentown "is a matter of 20 minutes, Bethlehem 15 minutes. To commute to Riegelsville you're talking about 10 minutes from the center of town." (A. 260). Herbert D. Stem, president of the First National Bank of Milford, estimated the commuting time between Phillipsburg and Milford at 20 minutes."* (R. 1484).

Willingness to Cross State Boundries and Traffic Patterns

The deposit analysis performed by the Riegelsville branch of Girard Trust shows a spread of customers on both the New Jersey and Pennsylvania sides of the Delaware River. Bankers solicit on both sides of the River (Pl. Ex. 52; R. 414, A. 603-05; Def. Ex. 60; R. 1333, at pp. 138, 142). Phillipsburg National itself has solicited consumer loans in Allentown and Bethlehem through dealers (Pl. Ex. 53; R. 414, at p. 206). Competition for Phillipsburg business is as likely to come from banks in Pennsylvania as from those in New Jersey. Competition for mortgages at Phillipsburg National comes from Easton National, Lafayette Trust and Valley Federal Savings and Loan in Easton, as well as from the First National Bank in Washington (now the Warren County National Bank) and all the other banks in Warren County (A. 255-56). Hunterdon County National and

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* On the roads linking the major cities of the SMSA, the travel time compared favorably with that in major downtown metropolitan areas where similar amounts of time are required to traverse a few city blocks. The district court concluded that travel time compared well with that within the City of Philadelphia, a portion of the market chosen in *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963). (See A. 680).

Girard Trust also compete for this business (*Id.*). Second National itself considers its geographic area to include Allentown and Bethlehem and to extend some 25 miles around the bank's office (Pl. Ex. 84; R. 1526, A. 657). Mr. Greer of Lafayette Trust, located in Easton, and Harold J. Cooper, formerly vice president and treasurer of Union Bank & Trust of Bethlehem, felt that their trading area included areas on both sides of the river and embraced the whole of the SMSA, with variations reflecting only their relative location within the SMSA (A. 388, 457). Charles Langner of the First National Bank of Belvidere, 11.5 miles north of Phillipsburg, attributes the growth in his deposits over the last decade to the fact that his bank was paying a higher rate of interest on savings than banks in Lehigh Valley or in Phillipsburg-Easton and that he thereby received considerable deposits from both Pennsylvania and New Jersey (A. 565-66).

There are other factors indicating significant and substantial commercial interchange across the river. People living in the Lehigh Valley readily cross the state boundary line between New Jersey and Pennsylvania to shop and to work (A. 260-61). Workers will freely cross the Delaware River to obtain employment. There are no jurisdictional restrictions preventing them from working at job sites on both sides of the river (A. 320-21, 411, 432-33).

Traffic at the free and toll bridges in Phillipsburg shows that a substantial number of people in the Lehigh Valley cross the Delaware on a daily basis. The general use of the two bridges connecting Easton and Phillipsburg shows that the 1966 average daily traffic on the Phillipsburg-Easton toll bridge was the highest total travelled of the Delaware River bridges. There were

22,439 automobiles and light trucks and 6,199 buses and heavy trucks daily. Traffic counts at the free bridge were also substantial, with 19,831 automobiles and light trucks and 400 buses and heavy trucks crossing daily (Def. Ex. 32; R. 1220).

There is also a heavy flow of traffic between Phillipsburg and Allentown-Bethlehem. The traffic count of vehicles starting in Phillipsburg and going to Allentown or Bethlehem shows 1,956 private cars and light trucks and 97 heavy trucks taking this route on a daily basis. This volume of one-way traffic was established by a traffic study combining the 1964 weekly and 1966 weekend average traffic volume over the free and toll bridges connecting Phillipsburg and Easton (Def. Ex. 61; R. 1432; A. 830; A. 260, R. 1428-31; Pl. Ex. 53; R. 414, A. 648). The significant number of bridge crossings over the two bridges linking Phillipsburg and Easton, one toll and one free, shows a continuing and constant flow and interchange of people throughout the trading area delineated by defendants, and establishes that people readily cross the state boundary. When daily traffic figures are related to the total population of Phillipsburg (18,502), it is clear that there is substantial social and commercial intercourse between Phillipsburg and Allentown-Bethlehem.

While consumers on both sides of the Delaware River treat the whole of the Lehigh Valley as one shopping market, there are additional incentives for residents of Lehigh and Northampton Counties to travel to Warren County, because of the differential in sales tax, the operation of privately owned liquor stores in New Jersey providing more individual service to the customer, and the availability of ample parking at stores like Orr's of Warren (A. 292-93, 373-74, 377-78, 432-33, 484; Pl. Ex. 53; R. 414, A. 648). A similar parking conveni-

ence is not available in the Easton or Bethlehem stores operated by Orr's (A. 372). The absence of any toll charge for telephone calls from Easton to Phillipsburg also facilitates the transaction of business across the Delaware River (A. 228).

Shopping Patterns and Deliveries

The three Orr's department stores located in Easton, Bethlehem and in the Hillcrest Shopping Center are used interchangeably by residents in the Lehigh Valley; a shopper may visit each of the three stores on the same trip (A. 261, 373-76). The willingness to shop from one town to another shows that the whole SMSA is considered to be one shopping market (A. 366, 499-500). Orr's of Warren, the store located in the Hillcrest Shopping Center, does not have any dominant shopping center to the east and northeast, and it draws customers from Blairstown, Hackettstown and other points within a 25- to 30-mile radius (R. 214, A. 373). The availability of parking at Orr's of Warren, which is lacking at the Easton and Bethlehem stores, also leads Bethlehem and Easton customers to travel to the Warren store (A. 372). Orr's, at its Bethlehem, Easton and Phillipsburg stores, provides a check-cashing service and it is just as likely to have checks from Easton, Bethlehem or Flemington in its Easton store, its Phillipsburg store or its Bethlehem store (A. 374).

Individuals residing in the Flemington area will often shop in the shopping centers located in the periphery of Phillipsburg (A. 472). Those residing in the Milford area, which lacks a shopping area, must travel into Phillipsburg or Flemington to do their shopping (A. 428, R. 1484). Because many of the towns in the area have no place to shop or bank, or because they cannot obtain

many necessary items in their hometowns, residents there will travel 25, 30 or more miles to do their shopping (A. 367, 372-73, 386). As a result the SMSA is the market area for shopping in the Lehigh Valley (R. 1096, A. 386, 389, 428; Pl. Ex. 52; R. 414, A. 613-14).

People travelling to the various shopping centers are apt to use the bank located there (R. 885). The tendency of shoppers to use the stores in the SMSA interchangeably and to bank at a facility near these stores further indicated to Nevins Baxter, the economist called by defendants, that the SMSA is a banking market (A. 512).

Market Area for Other Services

The market area for other goods and services varies, but it, too, indicates that the Lehigh Valley does serve as the banking market. Food and department stores serve a 25-35 miles radius (A. 372-73, 486). Prudential uses the SMSA as its basic operating unit (A. 311-12). Auto dealers serve a 20-25 mile radius (A. 437). Contractors and truckers serve an even wider area (A. 321, 432-33, 437).

The District Court's Evaluation of the Market

The lower court, on the basis of the evidenced produced, rejected the market areas proposed by the Justice Department:

> The areas beyond the cities of Phillipsburg and Easton are primarily rural with excellent highways for rapid and easy access to the well populated areas. This factor, associated with mobility of the population and economic integration of a much larger area, indicates that the market proposed by the government is too small. (A. 677)

The court found the area proposed by defendant banks to be "too large, but, nevertheless, more realistic than the proposals of the government" (A. 677). As to the relevance of the SMSA the court stated:

> There is considerable evidence which tends to support the argument of defendant banks that the SMSA is an appropriate geographic market. There is easy access by excellent, non-congested highways from one point in the area to the other and there is a high degree of economic integration (A. 677).

However, rejecting the markets chosen by all parties, the court delineated another market. That market includes 13 municipalities in Warren County, 10 in Hunterdon, 17 in Northampton and 5 in Bucks (A. 678-79). No part of Lehigh County was included. A few municipalities are within a 17-mile radius, and most fall within a 12-mile radius (A. 678-79). Commuting time in the area delineated runs from 7 to 20 minutes (A. 680). Characterizing the areas included within the market, the district court said:

> The areas beyond the boundary lines of the cities of Phillipsburg, Easton and Bethlehem are sparsely populated but progressing rapidly in development from farm lands to home development and industrial and commercial enterprise. All significant development is taking place beyond the city limits of the well populated cities. For example, the population in Phillipsburg has remained more or less static for a long period of time. Industry and commercial enterprise has been moving out of the well populated areas of the city. The same is true in some degree with the city of Easton. Branch banks have been established beyond city limits to service the needs of a rural community that is

growing rapidly in transition from an agricultural economy to commercial and industrial (A. 679-80).

The judge outlined the problems of congestion and deterioration in the central cities of the market and the consequent shift of business, banking and shopping to the suburbs. He concluded that to accept the government's proposed geographic markets "would be to ignore the population, commercial and industrial drift into the suburban areas within a radius of approximately seven to fifteen miles of the cities of Phillipsburg and Easton." (A. 680) The court further concluded that the "prevalent pattern of employment within a described area with regular and constant movement of the population and routine shopping by the population from one point to another" evidenced that the area was "economically integrated as a market." (A. 680-81)

Product Market

Now, added to the competition from commercial banks headquartered in the area at the time of trial is the competition provided by the large First District banks moving into defendants' trading area. Plaintiff's economist, testifying before the passage of the new law, agreed that, in assessing the effects of this merger, the new branching law must be considered, but he based his conclusions on the old law (A. 208-09). Now, three of the four largest banks in that District are spreading their influence into Warren County and the trading area (Int. Ex. 30; A. 581, A. 871).

The situation of these new banks entering the market parallels that of the Girard Trust in Riegelsville. There the Girard Trust has become a formidable competitor for trust business in Easton and Bethlehem (A. 110).

It has done substantial amounts of mortgage business in Phillipsburg and the surrounding communities (Pl. Ex. 53; R. 414, A. 635-36). The Girard branch, by a telephone call to the branch divisional vice president, can obtain approval for a $250,000 loan (Pl. Ex. 52; R. 414, at p. 99). The Girard Trust stands behind all its branches, ready to support their activities and to give them the competitive leverage that large banks enjoy in the saving and lending field (P. Ex. 52; R. 414, at pp. 96-97; R. 731). So pronounced are the differences between defendant banks and the Girard Trust that the district court specifically addressed itself to Girard's high percentage of demand to total deposits and its percentage of C & I loans. The district court thereby concluded that the defendant banks are primarily savings institutions (A. 672). It found that "[t]he activity of the defendant banks in the field of services unique to commercial banking is very limited." (*Id.*) Under these circumstances, it is necessary to turn to the activities of other financial institutions.

Activities of Financial Institutions

Even plaintiff's expert, Franklin Edwards, admitted that there is a vying for the savings dollar among commercial banks, insurance companies, mutual funds, stock market brokers, savings and loan associations, mutual savings banks, credit unions and pension funds (A. 238-40). On the lending side he likewise saw competition among commercial banks, credit card companies (some of which are now closely associated with banks), department stores, insurance companies, finance companies, mutual savings banks, credit unions, and building and loan associations (A. 238-41). It becomes essential to ascertain what those men actively engaged in the financial markets consider to be their competition.

Savings & Loans

Among the bankers testifying both for plaintiff, defendants and the intervenor, it was uniformly agreed that savings and loans and building and loans are direct competitors of commercial banks and that they are considered by the public to be as much a "bank" as the commercial banks are (A. 60-61, 71, 107, 158, 250, 273, 393, 459, 475, R. 334-35, 492; Pl. Ex. 52; R. 414, A. 610; Pl. Ex. 84; R. 1526, at pp. 267-69). The economic experts called by both parties traced the continuing interplay between savings and loans and commercial banks in their competition for the savings dollar (R. 750, A. 509). Savings and loans and building and loans take a major portion of the real estate mortgage loans in the Lehigh Valley area (A. 59, 108, 160, 251-52, 361-62, 475, 493). Their ability to offer a longer term and a smaller down payment makes them one of the greatest competitors of commercial banks (A. 59, 108, 160, 251-52, 361-62, 475, 493). One aggressive savings and loan, the Valley Federal, located in Easton, has taken mortgages in Warren, Lehigh and Northampton Counties (300 in Warren alone) (A. 274-75; Def. Ex. 47; R. 854; A. 821).

Savings Banks

Mutual savings banks are competitors of commercial banks both for the savings dollar and the lending dollar and are similarly considered by the public and by bankers to be in the "banking business." (A. 60-61, 158, 238, 240, 448-49, 475, 509; Def. Ex. 54; R. 1091; A. 826). The services offered by savings banks in New Jersey parallel those offered by commercial banks. As a result of banking practices in the State, they even offer checking accounts (A. 158-59, 448-50). The trust services offered by the Howard Savings Bank and others are

some of the best in the State of New Jersey and rival those offered by commercial banks in the area (A. 158). The strong impact of savings banks on the mortgage market has long been recognized by bankers and was recognized by plaintiff's economist (A. 59, 160, 240, 475-76, 493). While there are no savings banks headquartered in the areas delineated by the parties, the Howard Savings Institution has more than $2 million in real estate mortgages outstanding in Warren County alone, and the United States Savings Bank has both depositors and mortgage loans in Warren County (A. 450; Def. Ex. 16; R. 776; A. 809). The savings banks advertise over radio and television, so that Phillipsburg residents are well aware of the rates offered by these institutions (A. 252). Under the new law, savings banks, as Mr. Licklider, president of United States Savings, noted, may branch throughout the First District, just as commercial banks (A. 453-54).

Insurance Companies

The insurance companies are also recognized competitors. Commercial bankers and representatives of other financial intermediaries recognize that insurance companies, by making an appeal for the savings dollar, by making loans against the cash surrender value of policies and by participating in the commercial and industrial and real estate loan markets, are direct competitors of their own institutions (A. 60-61, 71-72, 107, 158, 250-51, 288, 296-98, 304-05, 393, 475, R. 970, Pl. Ex. 52; R. 414, A. 611).

Emanuel Gnat, chief of the policy and planning staff at the home office of Prudential in Newark, New Jersey, testified for defendants as to the activities of Prudential in the SMSA. As a former insurance agent in the field and as an instructor for new agents, he testified as to the

various incentives held out by the insurance industry in obtaining the savings dollar from the customer (A. 296-97). With 1,500 agents actively seeking business for life insurance companies in the ABE-SMSA, the trading area of defendants is more than well covered by agents (A. 312, 314-15; R. 959-60). The training program for new agents teaches them how to meet objections from persons who save at banks (A. 298) and tries to impress them with the need to sell the savings concept to the customer (A. 308).

Plaintiff's economist claimed that insurance companies were not very important factors in the attraction of the savings dollar (R. 733). But the emphasis placed by insurance agents on the savings aspect of life insurance has resulted in total life insurance industry reserves in the trading area amounting to approximately $456 million. That total includes endowment reserves of $60 million. These figures are based on Prudential's actual share of the market (A. 296-98, 306-08, 313-16).

Policyholders can and do obtain loans by borrowing against the reserve in their insurance policy at a rate no higher than 5% (A. 73, 301-02, 475).

Insurance companies are very active competitors in the C&I loan market in the trading area (A. 249, 302-03, 315-16, 494; R. 966). The Phillipsburg National Bank has itself participated with an insurance company in making a loan to a small businessman in the area (A. 249). Prudential holds $36 million in C&I loans in the area, representing some 989 loans to businessmen. Based on Prudential's share of the insurance market, it is estimated that $255 million in loans are held by insurance companies in the SMSA. Of Prudential's portfolio of such business loans, 15.7% are between $100,000 and $200,000 (A. 315-16).

Insurance companies are also recognized by bankers as one of the greatest competitors for mortgage loans (A. 73, 160, 475; Pl. Ex. 52; R. 414, at p. 128). Most of the mortgage loans taken by insurance companies are direct placement loans, but there are many instances where the insurance company will pay off the mortgage held by a bank (A. 73, R. 966). In the SMSA Prudential has $11 million in mortgages. Based on its share, it is estimated that the insurance companies hold $70 million in mortgages in the area (A. 315). When the mortgage loans and C&I loans of the life insurance industry in the SMSA are aggregated, the investment of the industry in the area is in the order of $325 million (A. 316). In addition, the insurance industry is a very strong competitor for the pension fund business; banks, insurance companies and equity funds all seek the same money from the employer with a pension fund (A. 298-300).

Credit Unions

Credit unions have been recognized by commercial bankers as a significant factor in the competition for savings and for loans (A. 61, 159, 250-51, 253, 475; Pl. Ex. 52; R. 414, at pp. 125-26, 129; A. 494). Credit unions in the area include the Ingersoll-Rand Federal Credit Union (hereinafter F.C.U.) which started over a year ago and already has 1,125 members, assets of $243,662, deposit shares of $237,380 and outstanding loans amounting to $223,063; the Nytronics Employees F.C.U. which has been in operation for 20 years and which has 329 members, $140,822 in assets, $131,380 in shares and $45,585 in loans; Baker Chemical F.C.U. which opened about five years ago and has 437 members, $200,197 in assets, $176,928 in shares and $179,583 in loans; and the Riegel Employees F.C.U. with 1,334 members, $898,977 in assets, $835,198 in shares and $574,186 in loans (A. 252-53; Def. Ex. 59; R.

1261; A. 829). These credit unions engage both in making loans to members and in providing a convenient opportunity for regular savings. The total credit union membership in the SMSA is 14,292 with total assets of $7,099,738 and total loans of $4,689,606 (Def. Ex. 59; R. 1261; A. 829).

Finance Companies

Evolution in the financial markets is changing the role played by the finance companies and the banks. As Homer Kripke, Professor of Law at N.Y.U. and an expert on the activities of finance companies, testified, these companies originally organized because commercial banks would not lend for the purpose of purchasing machinery or financing receivables (A. 342). The finance companies were early entrants in the field of automobile financing and the financing of consumer appliances, radios and television (A. 342-43). But banks have recently entered the field of consumer loans in earnest; they have actively solicited the loans formerly made by finance companies, and it is now estimated that 90% of those individuals seeking loans at a finance company qualify for loans at a commercial bank (A. 91, 159, 408-09, R. 1168). The finance companies themselves have been most aggressive in the area of personal loans, installment loans and automobile loans (A. 159, 475; Pl. Ex. 52; R. 414, A. 610-11). As part of this movement, commercial banks have been recruiting the trained personnel of finance companies either through the absorption of finance companies or by direct employment. The employment of Anthony Stillo is an example of the recruitment of finance company personnel (A. 343-44, 350, 408).

While finance companies may previously have obtained their money for lending purposes from commercial banks,

now they get less than 10% of their funds from that source and instead sell their certificates to other financial intermediaries and corporations, either directly or indirectly through commercial paper brokers (R. 387, A. 301, A. 346-48). A large corporation might buy a short-term note from a finance company for any sum not immediately required and thus economize on its demand deposit balances outstanding (A. 347). Large corporate pension funds also hold the term paper of finance companies (A. 346). By selling certificates to corporations and maintaining flexibility as to the term of the note, finance companies have obtained large amounts of corporate funds, thereby reducing the amounts kept in demand and time deposits and forcing the banks to issue interest-bearing certificates of deposit to recoup their losses of non-interest paying demand deposits (A. 300-01, 348-49). The few loans made by defendant banks to other financial institutions show that they themselves do not in any way share the competitive leverage that large city banks may have had at one time in lending to these institutions (Pl. Ex. 84; R. 1526, A. 653; Pl. Ex. 11; R. 85). As metropolitan commercial banks have become more aggressive competitors in consumer financing in the large cities, the finance companies have shifted their activities into areas where the local banks are not satisfying the demand for this kind of service, to areas like the Lehigh Valley (A. 349).

The direct competition between commercial banks and finance companies has thus been recognized as an important factor by commercial bankers (A. 61, 159, 475; Pl. Ex. 52; R. 414, at pp. 125-6). Finance companies have been very active in the commercial and industrial loan area in the financing of inventory and receivables (A. 239-40, 343, 494-95). Finance companies, some of which are associated with manufacturers, are actively floor planning

dealers in automobiles and appliances in the Lehigh Valley (A. 109, 249, 412, 418, 420, 429, 437, 444-45, 476, R. 1310). Finance companies have also taken equipment loans and have financed machinery in the area (A. 352, 487; R. 1073).

Finance companies active in the area include Ford Motor Credit Corporation, G.M.A.C., General Electric Credit Corp., General Acceptance Corporation with headquarters in Allenton and C.I.T. (A. 109, 249, 412, 418, 420, 429, 437, 444-45, 476; R. 1310). G.M.A.C. finances the Phillipsburg Oldsmobile dealer (A. 437). Small loan companies also have many offices which make their services conveniently available (A. 344-45).

The district court was impressed with the competition provided by finance companies in the lending market (A. 698). It found evidence of borrower necessity resulting in the finance companies with their higher rates doing the floor planning for local dealers, both in automobiles and appliances (*Id.*). The provision of a larger lending limit allowing the resulting bank to fulfill the needs of these local businessmen was found to be an "urgent need" (*Id.*) and one that would be "ultimately beneficial" (*Id.*) to the individual consumer in financing the purchase of goods. (This aspect will be more fully considered when the "convenience and needs" redounding to the benefit of the community are discussed.)

Mutual Funds and the Stock Market

The competition for the savings dollar afforded by stockbrokers and mutual fund salesmen has been recognized as a competitive factor by commercial bankers and the representatives of other financial intermediaries directly competing with commercial banks (R. 335-6, A. 61, 71-72, 107-08, 158-59, 238, 250-51, 254, 288, 297-99, 448-49, 459, 475-76; Pl. Ex. 52; R. 416, A. 611). While the

offices of stockbrokers are centered in Allentown and Easton, they solicit business throughout the trading area by telephone calls made to Washington, Alpha, and Phillipsburg, New Jersey, and elsewhere (R. 295; A. 288, 351-52). Mutual fund salesmen are active in the SMSA advertising locally in the newspapers and through brokers (R. 335, A. 254, 288, 459). The effect of solicitation by mutual fund salesmen from Allentown and Easton is felt by persons living in Nazareth, Pennsylvania (R. 335). In areas as small as that of Washington, New Jersey, there are three mutual fund salesmen canvassing the area (A. 71). Banks, such as the Nazareth National Bank and Trust Co., provide a service for their customers seeking to buy and sell securities, placing orders for their customers through their own brokers (R. 336, A. 158-59). Sales by brokers, like the consumer loans made by banks and finance companies, are no longer restricted to a limited clientele and are made to the average household head (A. 158-59). Commercial banks in the trading area are constantly experiencing withdrawals from deposit accounts for the purpose of purchasing stock shares and have been able to trace withdrawals directly to the purchase of mutual funds (A. 61, 158-59, 254, 393, 448-49; R. 307). To protect themselves from inroads of mutual funds, other financial intermediaries such as insurance companies have, through subsidiaries or new departments, introduced new products appealing to the mutual fund buyer seeking a hedge against inflation (A. 107-08, 297-99).

Department Store Operators

Commercial bankers consider consumer credit operations as competitors of banking institutions (A. 109, 449). Besides extending credit to their customers through charge accounts and providing them with a convenient outlet for

the purchase of money orders, department stores provide extensive check-cashing services, both personal and payroll, which rival banks in the volume of business (A. 374, 487-88; Pl. Ex. 52; R. 414, at pp. 136-7). Falk's department stores cash more checks than are cashed, all told, in the three Phillipsburg banks (A. 488). They issue money orders and American Express checks through some of their outlets (A. 488). Department store credit arrangements and other credit card operations are a significant factor in the consumer credit market (A. 494). Through the use of department store credit cards, individuals can economize on their use of checks and reduce the average balance of their demand deposit accounts (*Id.*).

Other Competitors

In the mortgage market a substantial number of loans are taken by private lenders and these lenders are active in the trading area delineated by defendants (A. 433, 476). Pension funds are also significant competitors for the savings dollar, with banks, insurance companies and the federal government contending for the dollar invested in these funds (A. 238, 297, 299, 393-94, 491). Finally, the federal Government, through its advertisement of savings bonds and other securities, remains a substantial competitor for the savings dollar (A. 288, 299, 448-49). Judicial notice may be taken that commercial banks, savings banks and savings and loan associations sell at each of their offices various notes and obligations of the federal government to their own customers.

The role played by each of these competitors has been capsulized in Exhibits D-1 (Def. Ex. 1; R. 776a; A. 781), D-2 (Def. Ex. 2; R. 776; A. 783) and D-3 (Def. Ex. 3; R. 776, A. 787), showing, respectively, the financial assets

held by households in the United States, one-to four-family mortgages by holder, and consumer credit by holder. In the United States, commercial banks through time and demand deposits hold approximately 14.5% of the total assets; savings institutions, including savings banks, savings and loans and credit unions, hold 12.07%, and life insurance reserves represent another 7.5% Def. Ex. 1; R. 776; A. 781). The rest is held by other intermediaries. In the mortgage area, banks have 14.78%; savings and loan's, 43.71%; mutual savings banks, 14.18% and life insurance companies, 12.71% (Def. Ex. 2; R. 776; A. 783). In the consumer credit area, commercial banks hold 41.43% while credit unions have more than 9% and finance companies over 24% (Def. Ex. 3; R. 776; A. 787). Based on various criteria (including the proportionate population in urban areas, median income, proportionate population in owner-occupied housing and proportionate amounts in bank deposits), it was determined by Nevins Baxter, defendants' economist, that the ABE-SMSA was a representative area of the country (Def. Ex. 6; R. 776; A. 791) and that other factors, such as the percentage of assets in commercial banks, the percentage of mortgages taken by commercial banks and the percentage of consumer credit held, would approximate the national averages (A. 495-96). Defendants claim herein that this approach based on the consistency of various factors in the ABE-SMSA with the national figures, remains valid, and that the Court can derive figures as to the total savings flow in the area and the distribution of savings and loans among various financial institutions congruent with the national distribution figures.

The District Court's Opinion As To Product Market

The district court found that "in many of the banking services offered by the defendant banks there is very viru-

lent and widespread competition from other banks and other financial institutions." (A. 670). Because there were so many sources for home mortgages, the court found that the merger would have no appreciable affect on any potential mortgagor. The court found "virulent and widespread competition for the savings dollar, conventional mortgage loans, individual and dealer automobile financing, dealer and individual financing of appliances, equipment and commercial inventory." (A. 673) Competitors for the savings dollar were found in the savings and loans, pension funds, mutual funds, insurance companies and government bonds (A. 673). Savings and loans and insurance companies were found to compete for mortgages, while finance companies, the court determined, competed for dealer and individual automobile financing and for financing of automobiles and equipment (A. 673).

The court sought to "single out those products and services which are not only unique to commercial banking, but also those where the banks in the relevant geographic market are directly and effectively competitive." (A. 674) Using this approach the district court eliminated trust services (neither bank is a factor in the trust business), real estate mortgage loans, automobile dealer financing, large-scale commercial inventory financing and commercial and industrial loans in excess of $100,000 (A. 675). Since the lending limit at Phillipsburg National Bank is $131,468 and the limit at Second National is $120,326, the court recognized that they could not separately compete for these commercial loans (A. 670). As will be noted later, it is in those areas excluded from the line of commerce and in which neither bank is now a factor, that the merger will peculiarly result in benefits to the public and allow the merged bank to serve the convenience and needs of the community.

Competitive Effect

In measuring anti-competitive effect the district court looked to the traditional guidelines employed in other section 7 cases. It found that "there is no historical trend toward concentration in the banking industry in this market and there is no present concentration." (A. 685) In the geogrgaphic area chosen by the district court Phillipsburg National Bank was found to be the seventh largest; Second National Bank, the 13th. After merger, the resulting bank would be the fifth largest with 6.76% of the total assets of commercial banks and 7.07% of total deposits. The actual measuring was performed, using statistics related solely to commercial banks headquartered in the geographic market. No discount was applied to reflect either the influence of outside banks or the activities of other financial intermediaries (A. 685-86). Nor was any reduction made to reflect the assets and deposits of the Girard Trust branch in Riegelsville. The branch figures for Girard were unavailable (A. 685). Without any trend toward concentration or the presence of any undue concentration, the Court found no presumptive inference of anti-competitive effect (A. 688). On the record, the Court found "that plaintiff has failed to sustain its burden of proof to establish by a preponderance of the evidence that the merger would have any measurable anti-competitive effect." (A. 69).

Convenience and Needs

Managerial Resources

Harry Pursel, president of Second National, is now 82 years old and would like to retire (Pl. Ex. 54; R. 414, A. 660). He became president 14 years ago at the age of 68. His predecessor retired at the age of 80 (Pl. Ex. 54; R. 414, A. 664). In his deposition testimony Mr. Pursel stated:

> We need younger personnel, officers. It is pretty hard to get male officers and something will probably have to be done about having a change in management. At my age I would like to retire.
>
> We have Lester Pursell and Dick Daubert who are coming along (Pl. Ex. 84; R. 1526, A. 660).

Lester Pursell is himself 74 and would like to retire (Pl. Ex. 84; R. 1526, A. 660-61). The bank needs younger men to replace its aging management (A. 442; Pl. Ex. 84; R. 1526, A. 660).

In 1965, William T. Greenley, a senior vice president of Fidelity Union in Newark, a correspondent of Second National's, was consulted about the latter's condition (A. 151-52). He advised the bank that because of the advanced age of the senior officers, the practice of soliciting outside opinions as to mortgage risks and the lack of experience in investments and trusts, the bank would require a mortgage specialist, a trust officer and a general operations officer (A. 152-53). He advised then that the bank could expect to pay a yearly salary to the mortgage officer of $9,000 to $14,000; that the figure for the general operations man was $10,000 to $14,000, and that the trust officer would command $12,000 to $15,000. During this two-hour discussion of the problems of the bank, Second National Bank specifically asked Mr. Greenley to see if he could find anybody willing to work for the Bank in a management capacity. Mr. Greenley kept a constant lookout for better than a year, reviewed the availability of members of his own bank's staff, and took Mr. Wilson, now assistant vice president at Fidelity Union, to Phillipsburg with the thought that he might accept a position, and that he would eventually become president (A. 153-54, 169-70, 406, 438-39). Mr. Wilson went

to Phillipsburg with Mr. Greenley on several occasions and looked the bank over. Told that the salary range was $20,000, he showed no interest (A. 169-70).

Individual directors, like Mr. Armstrong, have also attempted to recruit management. In July of 1967, Mr. Armstrong sought to employ a vice president of the Chemical Bank New York Trust Company or to have him refer a likely candidate. These efforts were to no avail because the New York banker wanted at least $30,000 a year with other benefits (A. 406-08). The banker referred to has not as yet referred anyone (A. 407). Mr. Seiss, another director of Second National, has attempted to attract new officers and is still seeking someone (A. 406).

Dr. Nevins Baxter, from his position at the Wharton School, was aware of these problems of small banks in attracting personnel:

> I know that there appears to be, from talking to students, a reluctance very often to go with a small firm because they believe that even if the salary were competitive the opportunities might not be as competitive (A. 507).

Baxter concluded that:

> . . . the smaller the institution the harder it is to give a guy who has had an education and a foundation, to give him enough of an opportunity to make it really attractive for him (A. 507).

Lester Pursell recounted the efforts of Second National in seeking personnel:

> We have promotions through the ranks but within the last few years it has been hard to get any

> We need younger personnel, officers. It is pretty hard to get male officers and something will probably have to be done about having a change in management. At my age I would like to retire.
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> We have Lester Pursell and Dick Daubert who are coming along (Pl. Ex. 84; R. 1526, A. 660).

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Lester Pursell recounted the efforts of Second National in seeking personnel:

> We have promotions through the ranks but within the last few years it has been hard to get any

> male help to even get interested in a job here, which we have been forced to take females and there are not too many of those around.
>
> We have tried to keep in touch with the high schools and business colleges without too much success as far as going out and picking out people for an officer, which is pretty high for our institution (Pl. Ex. 84; R. 1526, A. 654).

He later agreed with counsel for plaintiff that the salaries of officer personnel would be "prohibitive." (Pl. Ex. 84; R. 1526, at p. 289). He stated that from his observation of the letters sent by officer employment services that "we couldn't even touch those salaries . . ." (Pl. Ex. 84; R. 1526, at p. 289).

Phillipsburg National's president, Harold J. Curry, is 72 and he, too, would like to retire (A. 264, 321; R. 988). The executive vice president is almost 60, while Joseph Varga, vice president, is 41 (A. 264). A management gap, as asserted by the defendants, exists in both banks.

Salaries of Present Officers

To place the matter in proper focus, it is necessary to look at the salaries of the present officers. In 1967, the president of Phillipsburg National received in salary (including bonus) and director's fees $19,134; the present executive vice president received $12,371; and the vice president received $8,830. At Second National the corresponding earnings were president, $11,544; executive vice president, $12,563; and vice president, $9,346 (Int. Ex. 28; R. 1439; A. 865). The salary scale at both banks, compared with banks of like size, is much below the scale elsewhere (Pl. Ex. 53; R. 414, A. 645).

Intention to Hire Specialists

Once merged, the resulting bank intends to hire specialized officers and to departmentalize its operations (A. 265; Pl. Ex. 53; R. 414, A. 651). It intends to hire a mortgage specialist, a commercial and industrial loan officer and a trust officer. With this proposal in mind, the costs of these officers and those required by Second National must be considered.

Cost of Required Officers

The cost of a new president would range from $25,000 to $30,000, although it might be less for a small bank. The cost of a trust officer would range from $15,000 to $20,000, that of a mortgage officer from $15,000 to $22,000, and of a commercial and industrial lending officer from $18,000 to $25,000 (A. 112-13, 153, 475, 536-37, R. 1160; Pl. Ex. 53; R. 414, at p. 240). Defendants have been advised of the likely costs of these officers through specialized services operating as conduits for the hiring of such men and through discussions with other bankers. The salaries quoted by these services were out of reach and the banks could not even think of attracting these experienced men (Pl. Ex. 84; R. 1526, at pp. 289-90; Pl. Ex. 53; R. 414, at pp. 234-5). Adding to the cost of these specialists is the fact that the introduction of these men into the operation would require the bank to make a general salary adjustment and to extend any enhanced fringe benefits to other employees (A. 154-55, 168, 537, 541; Pl. Ex. 54; R. 414, at p. 16; Pl. Ex. 53; R. 414, at pp. 217-8, A. 645).

Factors Making Recruitment Impossible

The deterioration of the Town of Phillipsburg makes even more difficult the problem of recruitment of officer

personnel (A. 153, 169, R. 1453). For men of this caliber the town is not attractive.

The small size of defendant banks also makes recruitment extremely difficult because it makes evident both the inability of defendant banks to meet future salary increases and their inability to offer opportunities for advancement comparable to those of larger banks (A. 173, 284, 392, 451-52, 506-07, R. 341; Pl. Ex. 52; R. 414, at p. 134, A. 612). The fringe benefits now offered by small banks like defendants' simply do not compare with those offered by city banks in Philadelphia and New York and, as Mr. Greenley noted, this adds to the problem of recruitment (A. 170). The physical and capital limitations, as discussed later, also make the hiring of these specialists impossible.

The Three Specialists

To meet the competition of other banks armed with these specialists, it will not suffice for either of defendant banks to hire one specialist; the resulting bank must hire all three if it is to hope to protect itself from the inroads of larger banks (A. 540-41). The problem which neither of these small banks can solve alone has become acute with the entry of large Newark or other city banks into the trading area (Int. Ex. 30; A. 581; A. 871).

Impossibility of Hiring Without Merger

The salaries of the required officers and the associated upgrading of other employees' salaries make it impossible for Second National or Phillipsburg National alone to hire the three specialists (A. 265, 285, 405-06, 439, A. 442, 483, 537-38; R. 876, 880, 1306; Pl. Ex. 53; R. 414, at pp. 217-8, 244-5).

Plaintiff's counsel inquired of William J. Kinnamon, president of Hunterdon County National, what reasons supported his conclusions that the defendant banks, unlike his own, could not rely on internal growth to obtain these officers.

> A. You see, we started this program in 1946, seeing the handwriting on the wall, and we started out four new branches where they were just needed, because we saw this thing was coming, the reduction of earnings per dollar. These banks have waited too long to try to make it. I don't think they would make it by themselves. I would certainly hate to have to come in there and try that.
>
> Q. You don't feel that aggressive management can be found to move these banks along. A. Not if you paid them the entire net earnings of that bank, frankly, and with what they would have to put out in addition for other expenses to make the facilities that that fellow would have a chance to go—and he couldn't do it. That one person couldn't. He wouldn't have a chance to go with it. It just isn't in the wood with what stuff will produce today. For a while he had cheap money and not much expense. Now we have got very dear money and very high expense so the squeeze is actually a little tighter (A. 483).

Mr. Denton, of the First National State in Newark, felt that growth from within would be "extremely difficult" (A. 385). He described the future as "rather glum." (A. 384).

Charles Lewis, an assistant vice president in the correspondent bank department of the First Pennsylvania Bank and Trust Company in Philadelphia, when asked

about the minimum size required to justify hiring these three officers, stated that it required a bank with total footings of $35 million to $40 million (A. 537-38), and that neither bank could acquire the required talent alone (A. 538-39).

The Trust Officer

There is no full-time trust officer in Warren County (A. 281). Small banks in the area do not have significant amounts of trust business. As is shown in GI-4, Phillipsburg National had trust assets of only $2,331,000, or .82% of the total in the ABE-SMSA; Second National ranked last in the SMSA and had assets of $125,000, or .04% of the total (Int. Ex. 4; R. 1438; A. 838). Some small banks try to discourage this business and do not actively solicit trust work (R. 193, 276; Def. Ex. 49; R. 974, at p. 157).

Despite this attitude, many corporations in the area are interested, as the district court found, in having a bank take care of their corporate pension funds. (R. 218, A. 156, 265-66, 291, 354, 358, 390, 439, 486, 491; Def. Ex. 49; R. 974, at p. 157). Among commercial bankers, representatives of other financial intermediaries and local businessmen, there was almost universal agreement as to the existence of both a demand and a need for trust services in the area (R. 210, 1331, A. 69, 89-90 156, 166, 265-66, 291, 315, 325, 329-30, 354, 358, 374-75, 381, 390, 439, 539; Def. Ex. 60; R. 1333 at p. 175; Def. Ex. 49; R. 974, at pp. 157, 189-90).

For either bank separately to hire a trust officer would be impossible, not only because of the salary range of $15,000-$20,000 a year, but also because the prospective size of the single bank's trust department would not justify the employment of such an officer. (Pl. Ex. 84; R.

1526, at pp. 274, 288-9). Because of the length of time it takes to make a trust department profitable and the realization by trust officers that banks will often seek to terminate their contracts after the first few unprofitable years, it is impossible to attract a trust officer to banks like Phillipsburg National and Second National, which have negligible trust assets (A. 162-63, 172, 325, R. 398, 987).

The employment of a full-time trust officer by the resulting bank would be of substantial benefit to the community as is evidenced both by the restrictive policy of small banks in the face of a demonstrated need for trust services and an increasing demand for trust services. (R. 193, A. 69, 92, 160, 438-39, 446; Pl. Ex. 52; R. 414, at p. 137; Def. Ex. 49; R. 974, at p. 157). Plaintiff's economist claimed there were many fine substitutes for trust services, but he also admitted that the community would benefit if more alternatives for the provision of this service were available (A. 186-187).

The Mortgage Loan Officer

A mortgage loan specialist would appraise real property and develop and service the mortgage business of the bank. This activity now consumes much of the time of other officers and directors. A specialist would be aware of the value of various structural improvements; he would be quick to spot deficiencies, and he would, in any case, represent an improvement over the prevalent practice of appraisal by directors (R. 277, A. 152, 267-68; Pl. Ex. 53; R. 414, at pp. 217-8). Estimates as to the cost of a mortgage officer run from $15,000 to $16,000 annual salary, with the cost rising to $22,000 for an experienced man (A. 152-53, 475, 537, R. 1447). A mortgage loan specialist would allow the resulting bank to better serve the community in its handling of mortgages and, by freeing other officers, would indirectly give the bank opportunity to attend to other services (A. 267-68; Pl. Ex. 53; R. 414, at pp. 217-18).

The Commercial and Industrial Loan Officer

No bank in Warren County has a C & I lending specialist (R. 880). The C & I loans in Phillipsburg National, as of December 30, 1967, amounted to only $2,375,000; those in Second National totaled $1,300,000. (Int. Ex. 4; R. 438; A. 838). Even these figures may be overstated because of the practice of including municipal bond holdings and real estate within that category (A. 750). The lending limit of Phillipsburg National, based on 10% of capital, surplus and undivided profits was $120,326 at year-end 1967; that of Second National was $131,468 (Pl. Ex. 6; R. 85; A. 713).

The need for higher lending limits in the area, for increased capital investment in the area, and for a C & I specialist are all part of the same problem. To obtain a C & I specialist with experience and knowledge of the various credit arrangements would cost the bank between $18,000 and $25,000 a year for salary alone (A. 113, 475, 537). For each bank individually to hire its own C & I officer is impossible, not only because of the cost involved, but also because a C & I specialist would not be useful to the community or the bank if he lacked the competitive tool of an expanded lending limit, and if the total amount allocated to C & I loans in the bank's portfolio was insufficient to allow him to develop the field properly (A. 111, R. 837-8; Def. Ex. 60; R. 1333, at pp. 170-1; Pl. Ex. 53; R. 414, at pp. 223, 245, A. 639-40; Pl. Ex. 84; R. 1526, at pp. 259-60, A. 656). Without an increased lending limit, the bank would have to engage in a participation of the loan, or it would have to decline credit (Def. Ex. 60; R. 1333, at pp. 170-1).

The Increased Lending Limit

Phillipsburg National averages 25 requests over its lending limit annually. Second National averages 10 to

12. The increasing number of these requests shows the insufficiency of the present limits (Pl. Ex. 7; R. 85; Def. Ex. 60; R. 1333, at p. 166; Pl. Ex. 53; R. 414, A. 638, A. 261, 267). Many persons have refrained from seeking a loan at defendant banks because they are already aware of those limits (Pl. Ex. 84; R. 1526, at p. 258).

There has been a general increase in the loan amount requested. Many businessmen in the area are reaching a point in their operations where they will need loans ranging between $100,000 and $250,000, more than either bank can provide but within the limits of the merged bank. (See A. 249, 277, 303, 315-316, 353, 375, 429; R. 865, 997 1020).

The need for readily available credit is one of peculiar concern to general contractors. Contractors who must pre-qualify to bid on contracts with the state and federal government need readily available lines of credit (A. 322-25; Def. Ex. 49; R. 974, A. 620-21). A bank with its problems of capital allocation can only extend so many lines of credit, because many lines may become simultaneously active (A. 161-62). Since large banks with higher lending limits cannot extend this limit to all borrowers, there is a need for another bank with limits of over $200,000 (A. 162). For farmers and businessmen seeking to purchase equipment and for dealers carrying high-value items like color TV's and stereos, there has been a general increase in the amount requested (A. 148-49, 249-50, 270-71, 276-77, 481-82). The larger limit of the resulting bank would benefit automobile dealers and others; as the district court noted, they could obtain a lower rate than they now pay to a finance company (A. 698).

Benefits Resulting from Hiring a C & I Specialist

The presence of a trained officer specializing in C & I loans makes it easier to obtain participation by corre-

spondents and other banks. The correspondent will have confidence that the officer has made an adequate examination of the borrower's credit and that he is familiar with the business' prospects (A. 172-73, 383). A knowledge able C & I officer could provide advice to businessmen in the area as to alternative methods or procedures for borrowing money and aid them in the pursuit of ventures requiring ready access to capital (A. 330-31). With specialists who are more aggressive lending officers, the C & I rate charged by the bank would decrease as these officers sought to extend its business (A. 504). As a result of the merger, the bank would be able to serve a broader category of risks in loans; the knowledgeability of its specialized personnel would allow it to take risks it cannot now consider; and the adoption of a more aggressive policy would lead it to offer different maturities and terms not now available at defendant banks (A. 156, 160, R. 837-8, 1469-70).

Problems with Participations

It is often difficult, as Mr. Greenley noted, to find participants when money is tight. The correspondent often wants to be paid back first and will turn down loans involving unseasoned businesses or those requiring supervision (A. 157-58, 272-73). Because participants lack knowledge of the business seeking a loan, they may be slow to approve it, and they may turn it down (A. 249, 352-53). For the lead bank and the customer, participation means paperwork (A. 271). For these and other reasons, some customers of Phillipsburg National feel that such loans are unsatisfactory (R. 1191, A. 489; Def. Ex. 49; R. 974, at p. 173).

Benefits Resulting from Increased Lending Limit

The ability to floor plan dealers is one of the expected benefits of the merger. For the bank it will result in

economies associated with the financing of indirect dealer paper (Def. Ex. 60; R. 1333, at pp. 133-4). The bank will be able with more capital to have larger amounts tied up for longer periods of time (A. 157). The need of the resulting bank to lend a greater amount of funds, and its ability to do so with an increased lending limit, will probably result in a decrease in the C & I loan rate for small businessmen (R. 1313-4, 1469-70, A. 504).

Bankers and small businessmen recognize the advantage of a larger lending limit for the community since it would as a result of this merger, enhance the competition for loans between $100,000 and $200,000, allow the resulting bank to handle more loans without participating with correspondents, and allow the bank to continue to fulfill the needs of these businessmen whose lending requirements are expanding beyond the present limits (A. 143-44, 392-93, 468, 486-87, 502-03; R. 560, 1070, 1129; Pl. Ex. 53, R. 414, A. 637-38; Pl. Ex. 52; R. 414 at p. 148; Def. Ex. 49; R. 974, at pp. 157, 165, 173). The increased lending limit will prevent the flow of funds to the big cities outside the trading area. As it now stands, a businessman obtaining a loan from a large city bank must maintain a compensating balance there both during the period of the loan and often after its expiration. As a result, these funds are effectively removed from the local area and cannot be used by the local banks to make loans to other local busimen (A. 528-29; Pl. Ex. 52; R. 414, at p. 136).

Unless these small banks are allowed, through this merger, to stem the tide of money flowing out of the community, they will continue to fall behind in their service capacity, their ability to serve the growing needs of the community. These small banks will continue to grow, but they will fall further and further behind the large city banks siphoning funds from local areas like these

(A. 528-29, Pl. Ex. 52; R. 414, at p. 136). The future of the small bank, as Mr. Denton testified, is "rather glum" (A. 384).

Impossibility of Specializing Without Merger

The prospective size of the departments deemed necessary by the defendant banks in order to hire specialists after the merger, establishes that it is impossible for either bank to acomplish this goal alone (Def. Ex. 60; A. 1333, at pp. 130, 170; Pl. Ex. 84; R. 1526, at pp. 259-60, 266, A. 655-56). Given these problems of the cost of salaries, the size of departments deemed necessary, and the reduction in the differential between earnings and expenses, it is impossible for the two banks to develop these management personnel from within (A. 384-85, 443-44, 483, 540; Pl. Ex. 53; A. 414, at pp. 245-7). All the benefits expected to flow from hiring specialists and increasing the lending limit are a direct result of the merger; all of these benefits can only be achieved through merger.

Benefit from Hiring Specialized Officers

Commercial bankers, experts in banking, and small businessmen agree as to the importance of the service which specialized officers can provide the community by serving the customer at his point of business, by advising him of various financial alternatives and by learning more about his business through visits to various plant sites (A. 142-43, 155-56, 264-65, 330-31, 358-60, 386, 391-92, 461-62, 473-74, 500-01; R. 1276, 1330; Pl. Ex. 53; R. 414, at p. 249).

Increased Competition for Modern Banking Services

Many of the services to be provided are relatively unavailable in the area. It is hoped that the provision of these services by the merged bank will spur others to

engage in these areas. Asked what the effect of the merger of these two banks would be in the area, Mr. Cooper, formerly of the Union Bank in Bethlehem, stated:

> A. My answer is predicated on knowing exactly what exists in the area. I know Easton, Warren County like I know the back of my hand. I am not trying to set myself up as anything except to say to you in answer to your question it has to improve competition in the area. It couldn't do anything but improve the competition.
>
> The Court: Why do you say that?
>
> A. Because—the banks in that area have not concerned themselves about taking modern services and facilities to the community. I am sorry I have to say that.
>
> Q. What could they do as a result of this merger? A. Expand their services to an area that has been waiting for it for a long time and can see it (A. 461).

Because this merger will stimulate other banks to offer more modern services and facilities to the community, which they have not offered in the past, the convenience and needs which will redound to the benefit of those in the area include not only those provided by the resulting bank, but also all those other services which competing banks will provide in response to the competitive posture taken by the resulting bank (A. 391, 461-62, 477).

Other Benefits

Automation and Economies of Scale

A $35 million to $40 million bank could justify and make use of the services of a computer (R. 1124-25).

Defendant banks do intend to obtain computer services after merger (Def. Ex. 60; R. 1333, at p. 122; Pl. Ex. 84; R. 1526, at pp. 278-9; A. 268). Furman Denton, a correspondent banker, said with regard to the computer, ". . . I am not talking about a large-scale installation, but one that would adequately cover their present requirements and could be expected to handle the anticipated growth due to the development of the area." (R. 1125). Only through merger would it be feasible to employ the services of a computer. Its joint use would result in cost savings. Separately, there would be an insufficient number of accounts to justify its use (R. 1124-25, A. 381). With the computer,the bank will be able to provide better demand deposit reporting service to the customer. It will eventually be able to computerize time deposits, installment loans and mortgage loans. In time it will be able to service payroll accounts, those associated with the large demand deposit accounts of full service banks (A. 268; Def. Ex. 60; R. 1333, at p. 122).

Economies of Scale

Defendants' economic expert determined on the basis of one study that the resulting bank would enjoy economies of scale amounting to some $50,000 per year. Another study, using the functional cost analysis approach and employing the conservative assumption that the relative efficiencies of each of the merging banks before merger were equal (conservative because Phillipsburg National Bank could be expected to be relatively more efficient than Second National) yielded a savings of $22,000 per year (A. 504-06, 525-28). These specific economies of scale, in addition to other general economies, would aid the bank in allowing it to channel the savings into the development of specialized departments and to expand the number of branches (A. 380, 447-48, 504-06, 525-28).

Operation of Five Present Offices

With the resulting bank continuing to operate all five of the offices now in existence, customers could patronize any one of the offices, whether it is close to the customer's home or his shopping or working place (Def. Ex. 60; R. 1333; at pp. 182-3; Pl. Ex. 84; R. 1526, at pp. 277-78). With five bank office alternatives, the customers could be expected to distribute their business among them, thus reducing the waiting time at individual teller windows (A. 440).

New Branches

Consideration has been given to opening a new branch after merger (R. 799-800, 850, 884, A. 263). A merged bank would be better able to incur the cost of a new branch, given its present capital structure and current earnings (Pl. Ex. 54; R. 414,at p. 17; Pl. Ex. 53; R. 414, at pp. 222-3; R. 1235, 1330). With the economies of scale that can be expected to result from the merger and the increased revenue which the employment of specialists can be expected to produce, the resulting bank can obtain a sufficient differential between its expenses and earnings to justify taking the further step of investing in a new branch (A. 155, 263, 441, 506, 527-28; A. 799-800, 850, 884, 1330; Pl. Ex. 54; R. 414, at p. 17; Pl. Ex. 53; R. 414, at pp. 222-3). Additional branches would, of course, add to the convenience of the public in the area.

The District Court Opinion on Conveniences and Needs

The District Court reached two conclusions as to the service of the convenience and needs of the community:

> 1. The Court finds that there is a preponderance of evidence showing that any conceivable anti-competitive effect of the merger is clearly out-

> weighed by the effects of the transaction in meeting the needs and convenience of the community to be served (A. 699).
>
> 2. . . . even if there were *de minimis* anticompetitive effect in the narrowly drawn market proposed by the government such effect is clearly outweighed by the convenience and needs of the community to be served by the merged bank (A. 699).

These ultimate conclusions were based on a series of subordinate findings as to the services to be provided the community. The Court found that "[there] is a definite lack of competent trust service . . ." (A. 689). It found that "*very small banks* like Phillipsburg National Bank and Second National Bank do not have the financial capacity to maintain separate commercial and industrial lending departments and trust departments." (A. 689) (Emphasis added.) Looking to the growth of local commercial enterprise and the need for financial advice, the court concluded that "[another] larger bank offering these [commercial lending] services would diminish the existing inadequacy." (A. 689).

The Court also found that it would be impossible to provide these services without merger. It stated:

> The expense of highly specialized service in lending and servicing trust funds can only be incurred by banks *larger than* either Phillipsburg National Bank or Second National Bank. (A. 690) (Emphasis added.)

The problem, as the Court noted, is not merely the initial salaries, but also the need to upgrade all salaries from th president's on down and to increase the fringe benefits (A. 690). The Court concluded that these specialists "are

not easy to find" (A. 690), that they "are not likely to accept employment for a small salary or with a *very small bank*" (*Id.*). (Emphasis added.), and that it was "clear from the evidence that neither bank can afford the expense of employing well-trained specialists to head a loan and trust department." (*Id.*).

By its excerpts of the testimony of witnesses, the court showed that there was a definite need for these services in the community and that the resulting bank could be expected to serve that need.

The court also commented on the flow of funds out of the community to the detriment of the local banks and its customers. It recognized that a businessman who obtained a loan from a bank was likely to open a demand deposit account there and that, unless local loan demands could be satisfied locally, this source of funds "to stimulate industrial and commercial growth with all of its attendant benefits . . ." (A. 697) would be lost. The large city banks would siphon off the funds, leaving the local banks with the "savings bank" business they now conduct.

Introduction and Summary of Argument

In this case, the first case to come before the Court involving the merger of two small banks and the first case involving the full application by the lower court of the standards developed under the BMA '66, there are two basic questions. The first is whether the competitive realities facing these two small banks, their inability to provide the services of a full-service commercial bank and their operation in a vastly different competitive environment from large city banks, should be recognized. The second question is whether under the BMA '66 the resulting bank's service of the "convenience and needs of the community" should be viewed, as Congress intended,

in terms of a broad public interest test, and not as the Justice Department here proposes to confine it.

The product market must be viewed in a broad perspective. The areas of competitive weakness of these two banks are peculiarly those areas in which other financial institutions provide widespread and virulent competition. These two banks operate like savings banks. Their loans are principally real estate mortgages. They are presently unable to supply the full panoply of services associated with a full-service commercial bank. These two banks operate in the local market, and not in the national market. They are unlike other banks previously involved in merger cases before this Court. They are not a factor in the creation of credit. Other financial institutions operating in this local market are not dependent on these small banks for their funds and, as a result, these two small banks do not have competitive leverage in offering services to the customer.

Congress in passing the BMA '66 recognized that the competitive realities of the market must be considered and that banks face competition from mutual savings banks, savings and loans, building and loans, insurance companies, finance companies, other financial institutions and from various other agencies, including the federal government, which compete for the savings dollar and the lending dollar. Evidencing this awareness of the competitive realities of the market, Congress dropped the reference to "line of commerce" found in the Clayton Act and did not make any reference to the "business of banking" in the relevant section of the statute. This use of language and the interpretations placed on this language in Congress show that the fact finder was to be left free to determine the relevant product market. In prior bank merger cases this Court has only agreed

with the lower court that commercial banking is the relevant line in that particular geographic market, and on the basis of the record as to these particular banks. Nowhere has it said that commercial banking is the relevant product for all banks (both big and small) operating in every local area in this country.*

When the circumstances of the local market are considered, it is clear that commercial banking is not a relevant line of commerce. However, since the district court did perform its analysis in terms of commercial banking factors, there could not, in any case, be error here.

Since the evidence would have supported the delineation of a wider market area, the geographical market delineated by the district court is clearly a conservative one. Franklin Edwards, Justice's expert, based his opinion of the effect of bank mergers on SMSA's (A. 217-18). In *Philadelphia National,* which has been relied upon so heavily by the Justice Department, the Court there agreed that the relevant market was a four-county area with a population of over 3.4 million people and banks holding billions of assets. Here, by contrast, the largest market proposed by the Justice Department has a population of only 88,500, or five-ten thousandths of the total population of the United States (Def. Ex. 15, R. 776, A. 806). In defining the minimal limits of a market the Court in *Philadelphia* (374 U.S. at 459) looked to where a customer could practically turn for services. The Court there looked to the mean, "some fair intermediate delineation" (374 U.S. at 361) which avoids drawing the market too narrowly and too expansively.

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*See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 335 (1963) and *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 182 *n.* 15 (1968).

The two narrowly drawn markets proposed by the Justice Department emphasize one extreme, they look to where a customer might obtain services if he went bent on circumscribing his movement as much as possible, they do not look to where he might practically turn. Customers, even small customers, readily and regularly traverse the bounds of these narrow markets. In this new era of banking, the automobile, banking-by-mail and credit-card banking have vastly expanded the geographical boundaries of competition. Other service industries serve a much wider area and bankers themselves consider their market to far exceed that drawn by the Justice Department.

The areas drawn by Justice are not of sufficient commercial importance to provide a meaningful measure of competitive effect. They emphasize only one narrow extreme. In amending the Clayton Act in 1950, Congress deleted "community" as a correlative reference with "trading area." Its concern was only with an "economically significant" section of the country." *Brown Shoe Company* v. *United States,* 370 U.S. 294, 320 (1962).

Neither of the trading areas proposed by Justice have economic significance. They are only a small slice of the SMSA which government agencies have already recognized as having some economic significance.

In evaluating the ways in which the resulting bank would serve the convenience and needs of the community, the district court looked not only to Phillipsburg, but also to the benefits to the whole of the area. The district court enumerated both where the need was in the community and how it could be met by this merger. Here the only question is whether convenience and needs clearly outweigh anticompetitive effect; the district court need not go further once its examination has clearly shown

that convenience and needs do outweigh any anticompetitive effect.

Since Congress intended that a broad public interest test be applied in evaluating convenience and needs, advantages both within and without the market may be considered. Likewise, benefits to many different groups may be considered in the ultimate weighing. Here, the merger will result in benefits to the public which are relatively unavailable in the area and which will therefore be of peculiar benefit to the public. An increased lending limit and a C&I specialist will allow the bank to provide an additional alternative for large commercial borrowers. By thus stemming the flow of funds out of the area in the form of compensating balances, the bank will ultimately be able to reinvest these funds in the continued growth of the area. By allowing the bank to provide trust services, also relatively unavailable in the area, the merger will result in increased competition for these services. The pro-competitive posture taken by the resulting bank will encourage other banks to provide these services which are sorely lacking in the community.

The merger will also permit the merged bank to compete effectively with the largest banks in the First District which are entering the area. If these small banks are to maintain their independent status, they require these competitive tools to resist the inroads of these large city banks. If the banks are not allowed to merge, the ultimate decision-making power as to areas of investment will remain with the large banks now capable of funneling money from the local area to the area of greatest profit.

To obtain these services there is no alternative to merger. The banks could not afford to hire the required specialists, nor could they provide the competitive tools

necessary without this merger. The banks have shown that specific efforts were made to obtain managerial personnel for Second National and that any further efforts would not be likely to succeed.

The proposal that the banks show that other mergers were unavailable is impractical and burdensome under the circumstances of this case. A merger with a large First District bank was unavailable at the revelant time, two years before the effective date of the statute creating the new district. Similarly, the immediacy of the problem faced by Second National and the conservative attitude of other area bankers shows that merger with another Warren County bank was also unavailable. As recent mergers by large First District banks have shown, several Warren County banks are now unavailable and those remaining can hope for a premium for their stock from the large city banks. If these two small banks are to maintain their independent status and to prevent the further flow of funds outside the area, they must be allowed to merge.

I. The Product Market Delineated By The District Court Is The Relevant Market For These Two Small Banks

As to each issue raised in this case, the focus must be shifted from the circumstances of the large city bank involved in all prior section 7 cases, to those of the small bank, one which cannot provide the whole panoply of services associated with a full-service commercial bank. The banks involved in this case are in absolute terms small. Relative to other banks in the geographic market, they are small. The services in which they concentrate their activity are precisely those in which other financial institutions provide widespread and virulent competition.

In claiming that commercial banking is a relevant market in this case, the Justice Department relies heavily on this Court's discussion of the line of commerce in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) (hereinafter *"Philadelphia National"*) and in *United States* v. *Third National Bank in Nashville*, 390 U.S. 171 (1968) (hereinafter *"Nashville"*). In both of these cases the district court had already found on the facts that commercial banking was the relevant product market. In *Philadelphia National*, the appellees did not contest this ruling (374 U.S. at 335). In *Nashville* the Court merely agreed with the lower court's finding in a footnote attached to the Court's opinion. (390 U.S. at 182 *n.* 15)

Here, however, there was full and ample proof below that many financial institutions compete avidly for the same business sought by these two small banks. The district court fully considered this evidence in reaching its decision as to the elements of the product market. As we shall show, many dramatic changes in the market, in the statutory language of the BMA '66 and in the activities of financial institutions in this local area, required that the district court arrive at the conclusion it did.

A. The District Court used commercial banking factors to evaluate competitive effect

The Justice Department here seeks to challenge the district court's delineation of the product market. The district court made the following observations as to the competition faced by these banks:

> This competition comes in part from the banks located not only in close proximity to Phillipsburg but also from many others located a considerable distance from Phillipsburg. It also comes in substan-

> tial part from savings and loan associations, pension funds, mutual funds, government bonds, insurance companies and finance companies. Banks compete with savings and loan associations, pension funds, mutual funds, insurance companies and government bonds for the savings dollar. Hence, the bank savings account and certificate of deposit is not a unique bank service free from effective competition. Savings and loan associations and insurance companies compete with the banks for real estate mortgage loans. Finance companies compete for dealer and individual automobile financing and for financing of appliances and equipment. (A. 673).

These observations, however, did not affect the result. Even if the district court had used the product market advocated by the appellant, the result would be the same. In evaluating competitive effect, the court looked solely to commercial banking factors. The court evaluated the resulting bank's percentage of the total assets and total deposits of *commercial banks* (A. 683-85). It looked to the absence of any trend toward concentration "in the *banking industry.*" (A. 685) (emphasis added) It found that there was no present concentration in the banking industry (Id.) Looking to ease of entry into the market, the court restricted its consideration to the statutory requirements associated with commercial banks (A. 686-87). The court thus concluded that there would be no measurable anti-competitive effect and, indeed, that the effect would be procompetitive if other small banks were stimulated by the aggressive policies of the new merged bank (A. 688). If we look carefully to precisely what the court did, the accusation by Justice that commercial banking was

not considered as the product market is completely unfounded.*

B. The facts fully support the inclusion of other financial institutions in the market

The facts concerning the activities of other financial institutions in the relevant market have already been fully developed. These banks do not enjoy the competitive leverage of other commercial banks involved in prior section 7 cases. The percentage of demand deposits is low relative to that enjoyed by full service commercial banks. The percentage of commercial loans is also low. The banks simply do not provide the "cluster of services" found to mark the commercial bank in *Philadelphia National Bank, supra.* While both defendants might nominally be labelled commercial banks, and as an instance of "seller's puffing" may refer to themselves as commercial banks, they do not act as such. They are presently unable and have never been able to supply that sophisticated panoply of services which is said to distinguish a commercial bank from other institutions (Def. Ex. 17; R. 776; A. 492-93; Pl. Ex. 84; R. 1526, at pp. 283-84).

Those services said to be unique to commercial banking are peculiarly areas of weakness. They do not have large demand deposit accounts. Most of the accounts are maintained as convenience accounts by small depositors. The balance is kept small and suffices only to meet the recur-

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*The district court did not discount the percentage shares of the defendants in the market to reflect the influence of "outside" banks, or to reflect the influence of these other financial institutions found to be actively competing with defendants. These percentage shares really should be reduced to reflect the influence of "outside" banks (as was done in *Philadelphia National*) and to reflect the influence of other financial institutions.

rent monthly obligations of the customer. Phillipsburg National and Second National are small banks with many small accounts (Pl. Ex. 18; R. 85, A. 725; Pl. Ex. 22; R. 85, A. 733).

Moreover, the claim that the demand deposit is unique to commercial banks is not true in New Jersey. In *Hudson County National Bank* v. *Provident Institution for Savings,* 44 N. J. 282, 208 A. 2d 409 (1965) the New Jersey Supreme Court found that it has been "the usual custom of savings banks" to maintain checking accounts in New Jersey and that they could continue to do so under statute. Id. at 284, 208 A. 2d at 410; N.J.S.A. 17:9A-26(1).

Without large commercial loans, there can be no large compensating balances. As a result, these banks operating on the local level, and not on the national level like other banks previously before this Court are simply not a factor in the creation of credit.

The premises upon which the Court relied in *Philadelphia National* do not apply to these small banks, nor do they apply to the ever-changing competitive realities in banking. *Philadelphia National* was based on the competitive situation prevailing almost a decade ago. Today banks have infinitely more competition from other financial institutions.

Philadelphia National, after all, did not rule that in all instances a bank merger must only be evaluated in the commercial banking market. In *Philadelphia National* the district court ruled that for the purposes of section 7, commercial banking in the Philadelphia area is a line of commerce. The appellees there did not contest this ruling. And it was by footnote that this Court listed the cluster of services said to characterize a commercial bank (374

U.S. at 326 *n.* 5). Similarly, in *Nashville,* the district court had found that commercial banking was the relevant line of commerce. This Court, by footnote, agreed, on the facts, with that conclusion.* Nowhere has this Court said that as to all banks, big and small alike, that commercial banking is invariably the relevant market.

The premises upon which *Philadelphia National* was based no longer reflect the competitive realities of present day banking, nor do they reflect the competitive situation of banks which, like defendants', operate within local areas. The Justice Department itself in its brief submitted in *Philadelphia National* recognized that small banks present a different situation:

> All commercial banks, *at least all those of substantial size,* perform the same functions and render the same services. (Brief, p. 32)

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* The Court in *Nashville* said:

> We also find in the Act no intention to alter the *traditional methods* of defining relevant markets in which to appraise the anticompetitive effect of a merger, and so agree with the District Court that *commercial banking in Davidson County* was the relevant market for appraising this merger. (390 U.S. at 182 n. 15 (Emphasis added).)

Commenting on the above statement, the District Court in *United States* v. *First National Bank of Jackson,* 301 F. Supp. 1161, 1181 (S.D. Miss. 1969) said:

> This Court finds that the above statement by the Supreme Court was an affirmation of the trial court's determination that, under the *particular* facts and circumstances of that case, commercial banking was the appropriate line of commerce within which to measure the impact of anticompetitive effects, if any, of the proposed merger therein. (emphasis in original)

Justice recognized that small banks could not perform all the services nor could they be expected to do so.

The operations of these two small banks must be considered. They do not make any substantial loans to other financial institutions, and these other institutions are in no sense dependent upon them for their own funds. (See Pl. Ex. 84; R. 1526, A. 653; Pl. Ex. 11; R. 85). The Court in *Philadelphia National,* however, relied heavily on this factor in finding that the banks, as primary accumulators of money, had a competitive edge over finance companies and others. But, this consideration is wholly irrelevant for small banks operating in local areas. As Bernard Shull, a senior economist with the Office of the Comptroller, stated:

> No matter what the extent of their overall dependence on commercial banks for funds, large non-bank financial institutions are not necessarily dependent on commercial banks *in any particular local area.* These institutions can compete for the same local customers without concern about retaliation from local banks. "Commercial Banking as a 'Line of Commerce'" *National Banking Review* (December 1964) (emphasis in original)

Phillipsburg National and Second National are not a factor in the national market. They are not a source of funds for non-bank financial institutions.

Moreover, the overall dependence on banks has, as Homer Kripke testified, been much diminished. Now, these same financial institutions have entered the commercial paper market and through the issuance of short-term notes have attracted those funds that used to lie in demand deposit accounts.* Certificates of deposit have been is-

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* The increasing role of commercial paper is outlined in "Money Market Instruments," Federal Reserve Bank of Cleveland, January 1967, at 41-47.

sued by the bank to attract some of these funds, but the banks have been generally unsuccessful. Now, less than 10% of the funds used by finance companies are provided by banks; the vast majority of these funds are attracted by these other means (A. 346-49).

Many prominent economists recognize the vast changes which have occurred in banking since the decision in *Philadelphia National.* As Paul S. Nadler, an Associate Professor of Finance at N.Y.U. has recognized:

> Banks do not compete only with other banks. Except for the holding of demand deposits and the consequent ability to create money, each bank finds itself competing in every area of lending with the various financial intermediaries, with the money and capital markets, with the ability of corporations to finance themselves through internal generation of cash, and with government financing units. Paul S. Nadler, *Commercial Banking In The Economy,* at 176 (Random House 1968)

The areas of competitive overlap have resulted in a continuing interplay among financial institutions:

> In fact, it might be said that as competition develops in lending and in attracting savings and time deposit funds, each financial institution reacts by taking on more of the services of its competitors in an attempt to avoid the earnings squeeze through diversification. Banks have entered the savings and mortgage markets in competition with savings banks and savings and loan associations; banks are making more term loans, competing with the longer-term lending of insurance companies and pension funds; savings banks and savings and loans are

> working to enter the installment lending areas, since they face competition in their traditional loan outlet, the mortgage market. The choice of the borrowing customer becomes wider and wider. *Id.*

The result is simple: The areas of competitive overlap have expanded, the unique services of banks have diminished in importance* and, for some, have all but disappeared. Nadler sees the activities of financial institutions as becoming more and more similar as time goes on:

> The entire financial community is engaged in a trend toward what might be called *scrambled finance,* each type of institution becoming more like its competitors, and each bank and financial intermediary competing more with other institutions in its own industry as well as with institutions in other phases of the financial structure. Id. at 177

Professor Wallich of Yale University sees the banks as hobbled by regulations in their attempts to compete with these other institutions; he sees them losing the battle through excessive regulation.** Wallich recognizes that

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* T. H. Lee in an article entitled "Substitutability of Nonbanks Intermediary Liabilities for Money," appearing in the Journal of Finance, xxi No. 3 (September 1966) stated:

> The rapid growth of liabilities of non-bank financial institutions in recent decades has stimulated intensive discussion concerning the substitutability of such liabilties for money . . . this paper presents statistical evidence to show that non-bank intermediary liabilities indeed are close substitutes for money. (*Id.* at 441)

** Henry C. Wallich, "Banks Need More Freedom To Compete" *Fortune* (March, 1970).

"the bank continually encounters new non-bank competitors in areas of business they thought they had to themselves." (*Fortune,* March 1970 at 114). He sees the banks as caught in the credit squeeze:

> . . . the higher interest rates go, the more it pays depositors to economize on the holding of cash balances. As more highly automated payment techniques are introduced, factors adversely affecting the demand-deposit side of the banking business will multiply.
>
> . . . .
>
> To stay in the running, banks will increasingly have to replace demand deposits with time deposits. Even then, time deposits will be a reliable source of funds only if the Fed can be prevailed upon to give up the use of Regulation Q as a credit control instrument. (Id. at 140).

Wallich also sees competition on the lending side. Looking to the period before the present tight money situation, Wallich said:

> To be competitive, they must make it attractive to borrow from banks. In the recent period of strenuous demands for funds, of course, banks have hardly been beset with this problem. But for considerable periods earlier, they had to contend with mounting encroachment on their lending by life insurance companies and pension funds, and lately new breeds of competing lenders have reared up—finance companies, take-over specialists, high-risk lenders ready and eager to accept equity kickers. In times of less intense demand, the banks will have to adjust their lending to changes in competition and markets. (Id. at 143).

Similar conclusions were reached by the experts testifying in this case: Homer Kripke, an expert on the activities of finance companies; Emanuel Gnat, chief of the policy and planning staff for Prudential; and Warren Hill, president of the Savings and Loan League of New Jersey. Their conclusions as to the competition from other institutions were seconded by the economic experts in money and finance called by defendants and the intervenor: Nevins Baxter from the Wharton School and William Paul Smith, a senior economist with the Office of the Comptroller. Even Franklin Edwards admitted to difficulties with the "cluster of services" concept and the conclusions drawn from it (A. 182, 185-86). Banks are now competing in a market that includes many other financial institutions and the banks no longer benefit from the exercise of any competitive leverage in that competition. The competitive realities of the market therefore require that the activities of these other institutions be included in the analysis of the relevant market.

C. The Bank Merger Act of 1966 allows the fact finder to consider the influence of other financial institutions in determining the relevant product market

The B.M.A. '66, as passed by Congress, clearly contemplates that the activities of other financial institutions may be considered. The Act, as this Court has stated, imported the traditional antitrust standards from the Sherman Act and section 7 of the Clayton Act. *Nashville, supra,* 390 U. S. at 181-82. The analytical approach was to be the same, but it did not invariably follow that commercial banking was always to be the relevant line of commerce in each local area.

If Congress had wished to restrict the product market to commercial banking factors, it could have easily said so.

Instead, and as more fully developed later, we find extended discussion of the role played by other financial entities in the legislative history of the Act.

In the bill as passed we find the deliberate omission of any reference to "line of commerce," the phrase used in the corresponding portion of section 7 of the Clayton Act. The Clayton Act refers to:

> . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. (Section 7 of the Clayton Act, 38 Stat. 731, as amended 64 Stat. 1125, 15 U.S.C. §18)

In contrast thereto, *B.M.A.* '66 refers to:

> (B) any . . . proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or tend to create a monopoly . . . (12 U.S.C. 1828 (c) (5) (B)

The omission, while it may not affect the "traditional methods," is significant. When reference is made to the Clayton Act pattern from which it is taken, it is clear that Congress had no intent to legislate that commercial banking is the relevant line of commerce for all banks.

Looking to this specific omission in the statute, the district court in *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133, 155 (N. D. Calif. 1967) stated:

> . . . if change occurs in legislative language a change was intended in legislative result.*

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* This court did not express any opinion as to the significance of this omission in its opinion in *United States* v. *First City National Bank of Houston*, 386 U.S. 361 (1967).

What change?

The internal arrangement of Paragraphs (A) and (B) of Section 1828(c)(5) suggests that Congress intended to leave the Court free to define the market consistent with the commercial realities faced by the particular bank. Comparison of (A) and (B) shows the deliberate omission of the reference to the "business of banking":

> (5) The responsible agency shall not approve—
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the *business of banking* in any part of the United States, or
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anti-competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. (emphasis added)

The omission of the phrase, "line of commerce," as it appears in the Clayton Act model, and the omission of "business of banking" in paragraph B make clear the intent of Congress to leave the Court free to inquire into the parameters of the relevant product market and to include other financial institutions when the factual circumstances require.

Impressed by this distinction in *Crocker-Anglo National Bank*, the court there stated:

> Subparagraph 5(A) immediately preceding subparagraph 5(B) provides the first substantive test for bank mergers. It is in terms of monopoly. It refers expressly to 'the business of banking'. Congress obviously thought it 'made sense' and was not 'out of place' to use the words 'business of banking' when formulating the monopoly test. In the following paragraph Congress just as obviously must have thought it 'made sense' to omit those words. (277 F. Supp. at 155)

The "business of banking" was dropped. "Any line of commerce" was dropped. The district court as the fact-finder was left free to examine the competitive situation in the market and, as here, to recognize the activities of other financial institutions.

The legislative history supports this conclusion. Senate Bill 1698 as originally introduced by Senator Robertson, Chairman of the Banking and Currency Committee provided for an exemption from the antitrust laws for bank mergers. As amended by Senator Proxmire, the Bill passed the Senate and was sent to the House. There, an unprecedented struggle ensued as Representative Patman sought to bury the Bill and the majority of the members of the House Banking and Currency Committee, which he chaired, sought to have new banking legislation reported to the floor. After a rump session held by the dissidents in Patman's absence, a compromise was effected and Representative Patman reported the House version of the new legislation stating:

> Mr. Chairman, if I alone were writing the legislation and proposing it, I certainly would not pro-

> pose it as it is before us. I would be against it as a matter of principle. 112 Cong. Rec. 2357 (1966).

Those active in sponsoring the bill and in seeking the new legislation did speak out as to its intent. Congressman Ashley, a member of the dissident majority and the House manager for S. 1698 stated in House Report 1179, 89th Cong., 1st Sess. 4-5 (dated October 19, 1965):

> In making this review your committee expects the banking agencies, the Department of Justice, and the Courts to give full consideration to all aspects of the public interest, and take into consideration all elements of competition and all elements entering into the convenience and needs of those who are to be served by the resulting bank. The Committee recognized that commercial banks face intensive competition from other financial institutions —savings and loan associations, mutual savings banks, insurance companies, finance companies, and so forth. The Committee also recognized that competition between commercial banks and other institutions includes local competition, regional competition, national competition and even international competition for one part or another of the business. To overlook any one of these aspects of the competition, or to concentrate on one of them to the exclusion of the others, would be unrealistic and might well diminish, not increase, financial competition.

In recommending the House version of the Bill to the Senate, Senator Robertson, who had spent much time in effecting the compromise, echoed the comments of Mr. Ashley and of the District Court in *Crocker-Anglo*:

> The text of paragraph (B) of the new bill follows the terms of section 1 of the Sherman Act and section 7 of the Clayton Act, with the exception that the reference to "any line of commerce" in the Clayton Act is not carried over into the new bill. In this respect the new bill resembles the Bank Merger Act of 1960, and calls for an appraisal of the overall effects of the merger on competition, weighing increases of competition in one field against decreases in competition in another field. The banking agencies and the courts, in other words, are not intended and are not permitted to select some, single, perhaps minor aspect of the banks' business and to say that, because there is some lessening of competition in this element of the business, the overall effects of the merger—the increase of competition in the entire field of banking and in the broader field of financial institutions which may result from other aspects of the merger—are irrelevant and may not be considered. 112 Cong. Rec. 2655 (1966).

In delineating the market in which banks compete, Senator Robertson adopted a course not unlike that of the district court in the present case:

> In considering the amount of competition in a town, even a town with only one bank or no banks, we cannot overlook the importance of banking by mail. Many banks and many savings and loan associations, too, make a considerable effort to attract savings by mail, and this constitutes a substantial element of competition for funds, both individual and corporate, in large and small amounts, in every town which has a post office or a mail box.

Furthermore, the business of banking is not a simple or limited activity. On the contrary, commercial banking consists of many different activities, and there are competitors in other fields for each of these activities.

For personal demand or time deposits, banks compete with savings banks, savings and loan associations, and credit unions. This is real and fierce competition, as can easily be seen from the various trade publications and the newspaper advertisements which have followed the recent increase in the ceilings on interest rates in savings accounts in commercial and savings banks.

For consumer loans and home mortgages, commercial banks must compete with finance and insurance companies, in addition to savings banks, savings and loans and credit unions.

Commercial banks must compete for deposits from and loans to business firms, with insurance companies, factors, savings banks, and savings and loans, and even with the U. S. Government—both as issuer of bills and notes which corporate treasurers now find attractive in large quantities, and as issuers of vast quantities of FNMA, EXIM, and SBA, Home Loan Bank and other obligations or participations.

And in most of the other services commercial banks provide, they meet with other competition. Trust services are also provided by individual lawyers, as every lawyer in the Senate knows, or by professional trustees, about whom our friends from Boston can tell us. 112 Cong. Rec. 2655 (1966).

This approach, like that of the district court, involves a broadening of the product market. The district court, having found that other institutions compete with commercial banks, could have relied on the national averages for the distribution of savings and loans to determine the defendant banks' percentage shares in the market. *Cf. United States* v. *Crocker-Anglo National Bank, supra.* See *supra,* at pp. 38-39. The Justice Department claims that the district court created a series of sub-markets of commercial banking. In truth, the reverse occurred. The whole tenor of the district court's opinion shows that the court was seeking to describe the competition among all financial institutions and that, like those who participated in the passage of S. 1698, the aim was not to restrict the market to the narrow confines of commercial banking.

D. The traditional antitrust analysis supports the Court's delineation of the market in this local area.

Of necessity the product market within which a merger is to be considered depends, as does the geographic market, on the nature of the particular entities under consideration and the nature of the competition which they face. *United States* v. *Continental Can Co.,* 378 U. S. 441, 456-57 (1964); see also *United States* v. *Crocker-Anglo National Bank,* 277 F. Supp. 133, 199 (N. D. Calif. 1967). The line of commerce within which defendant banks compete must be viewed in terms of the services which these banks in particular provide; no preconceived industrial formula may be applied. See *Brown Shoe Co.* v. *United States,* 370 U. S. 294 (1962), calling for a consideration of the particular facts in each case.

The recent decisions of the district courts in bank merger cases uniformly show that "commercial banking"

as a line of commerce has lost its relevancy in the local market. In each of the five most recent bank merger decisions, including this case, the district court using the traditional methods of antitrust analysis has felt compelled to recognize that other financial institutions are now a part of the local market. See *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133, 153-62 (N. D. Calif. 1967); *United States* v. *Provident National Bank*, 280 F. Supp. 1, 7-9 (E. D. Pa. 1968); *United States* v. *First National Bank of Jackson*, 301 F. Supp. 1161, 1179-83 (S. D. Miss. 1969); *United States* v. *First National Bank of Maryland*, CCH Trade Cases §173.061, at 88, 157-88, 161 (D. Md. 1970). The district court in *Jackson* pointed to the specific problem arising in each of these local areas:

> The generalization about the "line of commerce" or "product line" as it may relate to commercial banking is not meaningful unless it is related to a specific geographic market. (301 F. Supp. at 1182-83).

The premises which might at one time have been applied to large city banks operating in both the national and local markets cannot be applied to these two small banks. If they are applied, then there is no need to consider the circumstances in the local area at all.

In the *Jackson* and *Maryland* cases, the district courts there concluded that the relevant line of commerce was broader than "commercial banking;" but, since the result would still be the same they evaluated the merger in the commercial banking market and found that there would

not be substantial lessening of competition.* The district court in the present case did precisely that. Using commercial banking factors to evaluate the effect of the merger in this local market, it found that there would be no measurable anticompetitive effect.

II. The Trading Area Delineated By The District Court Is The Appropriate Section Of The Country Within Which To Evaluate The Merger.

The Justice Department has expended considerable time and effort in attempting to show that either Phillipsburg and environs or Phillipsburg-Easton and environs is the relevant market area within which to appraise the effects of this merger. The Department has failed.

The Department by focusing attention on these narrowly delimited areas now proposes to fragment the country into literally thousands of tiny markets and to view anticompetitive effect in each. Phillipsburg-Easton and environs as proposed by the Justice Department for its "economically significant" market has a population of only 88,500, or five ten-thousandths of the total population of this country (Def. Ex. 15; R. 776, A. 806). Phillipsburg and environs, with a population of 28,500, has roughly one-third of that. These small areas cannot

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* The district court in Maryland stated:

> Those banks are in direct competition for a great deal of that business with savings banks in Baltimore City, or with building and loan associations as well as other financial institutions in and out of Harford County. To put blinders on and to ignore those facts would result in this Court attempting to assess present and potential commercial banking competition in Harford County in a vacuum. (CCH Trade Cases §173.061 at 88, 160)

conceivably be considered a "market" for antitrust purposes. Plaintiff's own expert, Franklin Edwards, in his market studies, had never analysed areas as small as these (A. 218-19).*

A. Justice has distorted the language of *Philadelphia National* in an effort to define a narrow geographic market for defendant banks

It must be remembered that the area chosen in *Philadelphia National* was a four-county area with a population of over 3.4 million people. The Court chose the area where branching was allowed in Pennsylvania. If we adopt the same standard here, we could choose the seven-county First District with a population in excess of 3 million, the area where branching *de novo* or by merger is allowed by virtue of an amendment to the banking law enacted since trial below. N.J.S.A. 17:9A-19. It is also to be observed that New Jersey holding companies are permitted to operate state-wide under companion legislation enacted the same day. N.J.S.A. 17:9A-345.

It is indeed difficult to reconcile the holding in *Philadelphia National,* that the geographic market is a four-county area, with Justice's contention that "the teachings of this Court," in that case, show that "Phillipsburg-Easton is a relevant market. . . ." (See Plaintiff's Brief at 33). More persuasive that the antitrust test to be applied in merger cases must be made on the basis of

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* There is here a grave question of whether areas as small as these are of sufficient commercial importance to require the attention of the Antitrust Department and whether future suits, which small banks like defendants can ill afford, should be encouraged on such bases. See *Wall Street Journal,* March 9, 1970, p. 14.

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anticompetitive effect. There must be "some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered." *Philadelphia, supra, Id.* at 361 (A. 676-77).

In the light of the evidence presented to the court, the market area chosen is a conservative one. Most bankers testified that their areas of effective competition embraced far larger areas, and that they drew their business from 20-25 miles around their bank offices (A. 43, 70; Pl. Ex. 84; R. 1526, A. 657; Pl. Ex. 53; R. 414, at pp. 205-06). The shopping and working patterns in the Lehigh Valley also demonstrated that people regularly travel longer distances to shop for convenience goods and that they commute to work over longer distances than that chosen by the district court in circumscribing the market (A. 45-46, 286-87, 372-73, 423, 441, 472-73; R. 281 . The roads in the area provide opportunity for rapid transit between the central towns and cities (A. 260, 327-28, 471-72; R. 1513). Shifts in population to the outskirts of some of the established towns and cities have resulted in changing patterns of working, shopping and commuting.

The market chosen by the district court is, as a result, a selective one, one which is based on the testimony in the record and one which does not adopt any of the mar-

kets proposed by the parties.* In *Philadelphia National,* the Court, after discussing the "direct and immediate" test (374 U. S. at 357), turned in fuller explication of that test to *Tampa Electric Co.* v. *Nashville Coal Company,* 365 U. S. 320, 327 (1961), and quoted the following with emphasis by the Court:

> . . . the "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practically turn for supplies.*" (374 U. S. at 359) (emphasis by Court).

The Justice Department somehow seeks to forget the emphasis of the Court; to forget the voluminous evidence in the record as to where customers of Phillipsburg National and Second National can turn to do their banking business; and to ignore the related evidence as to the mobility of the population, shopping patterns, commuting patterns and travel time statistics (A. 45-46, 260-61, 270, 320-321, 327-28, 366, 372-76, 386, 411, 423, 428, 432-33, 471-73, 499-500, 512; R. 1428-29, 1484; Def. Ex. 32; R. 1220; Pl. Ex. 53; R. 414, at p. 241).

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*The Justice Department suggests in passing that one factor to be considered is "the view of other federal banking agencies that the region was an area of effective competition" (citing *Philadelphia National,* 374 U.S. at 361). As both the statute and this Court have made quite clear, the district court is to hold a trial *de novo.* Since the district court had available an abundance of evidence which was not presented to the banking agencies, including evidence as to recent changes resulting from the amendment to the banking law in New Jersey, the Court's application of the same standards as the agencies under statute need not and could not lead it to the same result as to the extent of the geographical market.

Viewing the question realistically, what is sought to be prevented is the concentration of market power in any geographic area in which a customer would ordinarily seek the services or the product in question, and beyond the boundaries of which he would not ordinarily travel to seek alternative sources. For this reason, the most useful standard by which a geographic area within which to assess a merger can be described is determined by the area within which financial entities can or do operate, and purchasers can seek alternative sources for the services in question. Although people can and do travel to Philadelphia and Newark in certain instances, while others travel only three to four miles, these are the extremes and not the reasonable means by which the area should be described.

In *Philadelphia-National,* the Court looking to where the customer could practically turn for banking services determined that the facts supported a four-county market containing some 1420 square miles and 3.4 million people. The area and population in that case far exceeded that found by the district court in the present case. The area in *Philadelphia National* embraced the whole of the permissible branching area. In New Jersey, now, the defendant banks could branch throughout the whole of the First District including seven northern counties. The new district runs from the Hudson River to the Delaware River and includes some of the most populous counties in the State. The population of this District according to the 1960 census was 3,095,247; its area was in excess of 2000 square miles. If the limits of permissible branching are taken as the test, then clearly the district court's market is a small one.

C. The small areas chosen as plaintiff's proposed markets do not comprise a "section of the country"

In seeking to find an anticompetitive effect under the traditional antitrust standards, the Justice Department has been forced to delineate a "mini-market" in this case, one which cannot be said to constitute a meaningful "section of the country." Franklin Edwards, plaintiff's expert, supports this market on the basis of what he calls "casual empiricism." (A. 187-194, 213; R. 712). Having strolled through downtown Phillipsburg one morning (A. 221-23), he finds that theoretically one could obtain the essential goods and services without straying from the town (A. 189-90). Then, on the basis of banking statistics as to customer location he claims that either Phillipsburg and environs or Phillipsburg-Easton and environs is the relevant market (A. 202-203). Edwards admitted that as to Phillipsburg and environs his was "a rather surprising conclusion." (R. 649). He also admits that his approach relying on banking statistics alone makes no allowance for potential competition (A. 198).

The standards developed by Franklin Edwards in his testimony are not even in accord with *Philadelphia National;* he did not ask himself where the customer can *practically* turn, he looked to where he might turn if he were bent on circumscribing his movement as much as possible. His analysis emphasizes one limited extreme. The analysis is one which has lost its validity in this mobile age, an age where banking-by-mail and credit-card banking have vastly expanded the geographical boundaries of competition.

Now, the customer need not make frequent trips to the bank. For the small customer, especially, a trip to the

bank to obtain a small loan or make a small deposit is no longer necessary. To obtain a small loan, he can use one of the widely advertised check loans; the small customer, in effect, has been granted a "line of credit." To make a deposit, he can use the corner mailbox. To purchase goods, he can use either the check loan or one of the many credit cards that he now carries in a special credit card wallet. The universal credit card, with direct credit of the individual's paycheck and debits applied after each purchase has not yet arrived, but there are many who see it coming. Now, when small payments or deposits are made, the bank customer can readily use the nearby mailbox and still be miles away from the bank itself. Looking to the smallest area conceivable to him, as Franklin Edwards did, is no longer practical when these new conveniences have vastly expanded the market for the small customer.

The district court, recognizing the limitations of Edward's analysis stated:

> . . . even if little or no business is presently derived from a particular locality, if there is convenient ease of access to the market, the *potential* use as a satisfactory, convenient alternate choice should be considered (A. 681) (emphasis added).

Moreover, the areas delineated by plaintiff do not constitute an economically significant "section of the country." Before plaintiff can claim that the judge erred in viewing competition in a single market, it must show that one of the other areas it proposes is a "market," an economically significant area. The "section of the country" chosen must be a "market," it cannot be a slice of a market. As this Court stated in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 336-37 (1962):

> Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal legalistic one. The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.

When the Court subsequently considered the banking situation in *Philadelphia National,* it confirmed the applicability of this reasoning in *Brown Shoe.* It noted defendant's concession that "the four county area has *sufficient commercial importance* to qualify, under *Brown Shoe Co., supra.* (370 U.S. at 336-37), as a 'section of the county' within the meaning of section 7." (374 U.S. 321, 359 n. 36 (1963)) (emphasis added)

The communities chosen by plaintiff as a "section of the country" lack the economic significance ascribed to them. As the voluminous statistics with regard to the ABE-SMSA demonstrate on this record, Phillipsburg and environs and Phillipsburg-Easton and environs as a *practical* matter are not economically self-sufficient areas; they are only a part of this larger area described by the SMSA. They are a slice of the "market." It is the larger area, as circumscribed by the district court, to which the customer can and does turn for his daily needs.

The narrowly drawn areas proposed by plaintiff are not of sufficient commercial importance. Within the largest of the two can only be found five ten-thousandths of the total population of the country. Typical service industries in the area are set up on a much wider basis than

Phillipsburg-Easton and environs (A. 373-376). The insurance industry uses the SMSA as its basic working unit (A. 310-13; Def. Ex. 48; R. 939). Automobile dealers are given the Lehigh Valley as their service area (A. 437, R. 1233). Truckers and contractors operate on even wider bases (A. 320-21, 423, 433).

The Justice Department has sought to carve too small a piece out of the integrated ABE-SMSA. Even the small customer readily and regularly traverses the bounds of these small markets. The markets chosen do not reflect the reasonable mean which this Court said would become apparent from looking to the areas of competitive overlap. The areas chosen are impractical, insignificant and insufficient; neither one is a "market."

D. The evidence would have supported the District Court's choice of a wider market in this case

The district court could have chosen a wider market in this case; it could have chosen the ABE-SMSA. Recognizing the opportunities for rapid transit and the high degree of economic integration in the SMSA, the court said:

> There is considerable evidence which tends to support the argument of defendant banks that the SMSA is an appropriate geographic market. (A. 677).

The SMSA is the only market area in this case representing the independent determination of government agencies arrived at without reference to the proposed merger. It is the only market which has previously been found to satisfy the criteria for a standard metropolitan statistical area. It is the only market which clearly has economic

significance. With one of the lowest concentration ratios as published by the F.D.I.C. in its statistical survey (Def. Ex. 9; R. 776, A. 794), it is the only market area proposed where concentration ratios may be of sufficient commercial importance. Clearly, if an area with only seven banks is chosen, almost inevitably the four largest will have over 56% of the deposits. The statistics themselves belie the insignificance of the "market" areas advocated by the Justice Department.

III. The District Court's Consideration Of The Convenience And Needs Of The Community To Be Served In The Areas It Selected Showed That The Community Advantage Would Outweigh The Assumed Anticompetitive Effect In Any Of The Trading Areas Chosen By The Parties

A. The Decision Of The District Court Is Consistent With The Bank Merger Cases Heretofore Decided By This Court

Justice, by repeated quotations from *Philadelphia National* and *Nashville* seeks a definition of product and geographical market contradicting that pressed for by defendants and the intervenor, and that actually chosen by the district court.

It should be kept in mind that *Philadelphia National* covered a wide four-county area with a population of 3.4 million and banks holding billions of assets. *Nashville* covered an entire county with a population of 400,000 and banks holding over one billion in assets. Justice now seeks to use these cases to claim improper a market chosen by the district court approximating one-half of the ABE-Pa-N.J. SMSA with a population of roughly 200,000 and total assets of about $600 million.

In *Nashville* and *Philadelphia National,* there was no hearing by the Comptroller. Here there was.

In *Nashville* the lower court did not make an independent determination of the convenience and needs requirement. Here the Judge in a *de novo* proceeding made such a determination.

In *Nashville* and *Philadelphia National* there was obvious concentration and a continuing trend to concentration. Here there was no concentration nor trend.

In *Nashville* the Court rightfully held the merger suspect so far as "convenience and needs of the community to be served" were concerned when it pointed out that the owners of the acquired bank preferred not to make serious efforts to improve management, but rather sought the merger route which produced a "profit of $750,000 on a two-month investment of $3,800,000." (390 U.S. at 192). Here there was no premium for the stock (A. 154-55, 380). Here serious efforts were made to obtain management (A. 151-54).

Nashville recognized that the holding of *Philadelphia National* was altered by the BMA '66. But it held that the district court had not been specific in describing the beneficial consequences of the merger for the Nashville community. Here the district court found that the merger fully met the convenience and needs of the community to be served. *Nashville* recognized among other advantages to be considered was a larger lending limit. (390 U.S. at 186). The district court here found a need for such a larger limit. *Nashville* recognized that many other services should be considered as meeting the community need. The district court here enumerated both where the need was in the community and how it could be met by this merger.

B. The District Court Applied Standards Consistent With The BMA '66

The Justice Department claims that the district court erred in its assessment of convenience and needs, that it restricted its consideration to Phillipsburg alone, instead of looking to the whole of the trading area previously delineated. The interpretation made by the Justice Department is clearly an inaccurate one; once again, the Department is using blinders to ignore the tenor of the district court's opinion. The district court made two ultimate findings:

1. "The Court finds that there is a preponderance of evidence showing that any conceivable anticompetitive effect of the merger is clearly outweighed by the effect of the transaction in meeting the needs and convenience of the community to be served." (A. 699)

2. "[Even] if there were *de minimis* anticompetitive effect in the narrowly drawn market proposed by the government, such effect is clearly outweighed by the convenience and needs of the community to be served by the merged bank." (A. 699)

The first conclusion appears in the concluding section of the district court's opinion; the second, in its final conclusions.

An examination of the tenor of the opinion is necessary. Nowhere does the district court equate "community" with Phillipsburg and nowhere does it purport to limit its findings as to the conditions "in the area." At the beginning of the section of the opinion dealing with convenience and needs the district court states:

> There are only a few of the larger banks *in the area* that can handle loans of $75,000 and upward (A. 689) (Emphasis ours)

Continuing, it states:

> There are very few banks *in the area* that are even partially equipped to furnish large commercial and industrial enterprise with the kind of trust and loan banking service that is needed. Another larger bank offering these services would diminish the existing inadequacy." (A. 689) (Emphasis ours)

After including a series of excerpts from the record showing the genuine need of the community, the court continued:

> The foregoing are only a few excerpts from a volume of evidence which clearly establishes the inadequacy of loan service and trust service available in the community and the need for improvement in that aspect of local banking. As commercial and industrial enterprise continue to grow and increase numerically *in the area,* a substantial part of banking business will have to be done outside the *community.* (A. 697) (Emphasis ours)

The generic equation of "community" and "area" simply will not support the Justice Department's proposed reduction of the findings to encompass only Phillipsburg. The district court considered the advantage to the whole of the area and performed the required weighing in both the actual market and the theoretical "markets" proposed by the Justice Department.

Also, just as a matter of pure logic, the purported issue raised by the Justice Department provides its own answer. The only question is whether anticompetitive effect is clearly outweighed by the convenience and needs of the community. Assuming the district court concluded that convenience and needs in the inner circle (Phillips-

burg) clearly outweighed anticompetitive effect in the outer circle (the trading area), there was no need to go further. The test was satisfied. Even if the Justice Department should prevail as to the relevant geographic market, still the district court's findings would be sufficient. It has already found that the convenience and needs of the community outweigh the anticompetitive effect even in the narrower "community" or "section of the country" proposed by the Department.

The Justice Department claims that when a merger has a substantial effect on a particular group of people in a particular area, only the convenience and needs of the same people in the same area may be considered in the weighing test. This rather particularized intent is said to be the manifest intention of Congress, but no citation at all is made to the debates or reports in Congress.

In considering the convenience and needs of the community to be served, Congress, however, clearly intended a broad "public interest" test to be applied, and not one that looks only to the structural limitations of the trading area. In so doing, Congress specifically sought to reverse the conclusion reached in *Philadelphia National* that "anticompetitive effects in one market could [not] be justified by procompetitive consequences in another." (374 U.S. at 370). A series of remarks by various Congressmen, members of both the dissident majority and the Patman factions, shows that a broad public interest test is now to be applied.

> Mr. Ottinger: The public interest in competition is to prevail unless clearly outweighed by the public interest in meeting the convenience and needs of the community to be served. (112 Cong. Rec. 2456 (1966)

• • •

Mr. Todd: I refer to page 3 of the committee report where the following language appears: "but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served," and so forth. In a case such as this are we talking primarily about the effect on the local market of the merger, or are we talking about the service to the community in which the bank is located?

Mr. Ashley: I think the answer to that question is that it can be both. It depends on the facts of the particular case.

Mr. Todd: If, for example, the market is not served by the national money market, then you might say that the national money market should be considered in addition?

Mr. Ashley: This might well be a factor. (112 Cong. Rec. 2457 (1966))

* * *

Mr. Reuss: What is meant by that provision and what counts is the effect of the transaction in meeting the needs and conveniences of the community which that particular sought-to-be merged bank serves. In considering the convenience and needs of that community, one may, of course, look at the situation outside of the community in the larger regional or national market. But conditions in that regional or national market are relevant only insofar as they affect the convenience and needs of the community to be served.

I should like to ask the gentlemen from Ohio [Mr. Ashley] with the permission of the gentlemen from

n [Mr. Todd] whether he disagrees with
ave said.

ley: I can scarcely disagree with my friend
n as we worked hard and long over that
and that very interpretation of the lan-
112 Cong. Rec. 2457 (1966))

Report directed itself specifically to the
etition which this Court refused to consid-
hia National:

acknowledges that the general principle of
trust laws—that substantially anticompeti-
gers are prohibited—applies to banks, but
an exception in cases where it is clearly
at a given merger is so beneficial to the
ice and needs of the community to be
ecognizing that effects outside the section
untry involved may be relevant to the ca-
the institution to meet the convenience
s of the community to be served. (H. R.
1179, 89th Cong., 1st Sess. 3)

was returned to the Senate, the following
ed:

rtson: The bill makes clear that while the
titive effects of a proposed merger are to
t weight, the probable effects of the mer-
ie public interest are to be controlling.
particular community may have a bank-
which can be supplied by the merged in-
the fulfilling of which may be so benefi-
e public interest that it outweighs any
titive effect of the merger.

> Mr. Long of Missouri: What area is encompassed by the term "community to be served" in the bill? Mr. Robertson: This means the entire area to which services are or could be supplied by the proposed merged institution, and such area is of course not limited by city, county, or State geographical boundaries. As I have said earlier, the emphasis here should properly be on the words "to be served." A big New York bank serves local customers in New York, and it serves the big nation-wide industrial firms across the country and around the world. Artificial boundary lines, branching areas limited in one way or another by the different States have little or no significance. (112 Cong. Rec. 2663 (1966))

Convenience and needs in the local market, the regional market and the national market may be considered, if necessary. But there is no need to extend the discussion of convenience and needs once the public benefit is found to outweigh the anticompetitive effect.

In the present case, it was shown that merger would be of considerable benefit to local businessmen. Specialized officers could help local businessmen with their credit needs and could advise them properly as to the investment of their funds in profit-sharing and pension plans. The district court found that the provision of these specialized services might evoke a procompetitive response in the community:

> Indeed, there is a preponderance of evidence to support a conclusion that the merger would have procompetitive effect *if* the merged bank, employing its increased resources, adopted aggressive policies which would have a tendency to stimulate

other small banks to become more aggressive in serving the needs of the community. (A. 688)

There was evidence that the increased lending limit and the need of the bank to lend larger sums of money would lead to a decrease in the C & I loan rate for small businss-men. (A. 380, 387, 394, 448, 461, 477-78, 504, 545-46). The effect on the passbook rate would also benefit the customer. Commercial bankers who have been involved in bank mergers, and those who have studied the results of mergers (and not just a cross-section study at a particular time*), agree that to their knowledge there never has been an instance where a merger has had the effect of lowering rates on passbook accounts, but that they have on occasion led to higher rates (A. 380, 387, 394, 447-48, 461, 477-78, 504, 545-46).

The Justice Department erroneously claims that the small customer has been harmed and only the larger customer benefitted. No such conclusion could be drawn on the record. At the trial the Justice Department produced no one who complained about the effect of the merger upon him. Not a single complaint was heard by public officials. Not a single banker claimed that the merger would have an adverse effect on his operations. All viewed it as healthy competition. The procompetitive response of other banks can only help the small customer

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* Edwards' study of loan rates to small businessmen dealt with loans made at a particular time, in 1955; it dealt with the circumstances of those times and preceded the recent, dramatic changes in banking. Even then, its theoretical approach was seriously questioned by Theodore Flechsig in *Banking Market Structure and Performance* (1965). Flechsig questioned the failure to account for regional differences and the bias introduced into the statistics through the inclusion of mutual savings banks in the concentration ratios.

as well as the large. The public interest in increasing competition clearly will be served.

The situation of the small customer must be considered. Generally, he requires fewer services than the larger customer, and generally, it is *these* services which other financial institutions compete avidly to supply. Both small banks and larger banks can supply the services of these customers. Other financial institutions, as the district court found, provide widespread and virulent competition for these services; and their services are regularly used by the small customer. What is happening is quite evident. The larger customer is here gaining an additional alternative when he has often few alternatives for the supply of his particular requirements. The competitive effect on the small customer is non-existent; the procompetitive benefit to the businessman is obvious. It clearly outweighs any conceivable anticompetitive effect. Oddly enough, in the provision of certain services, related to the bank's lending limit, its trust services and its C & I services, the market is still relatively oligopolistic; and it is here that a new entrant is of peculiar benefit to the community in encouraging a procompetitive pricing and service response by those already providing these services.

In the present case, both the Congressional history and common sense support the approach taken by the district court. To equate "section of the country" with "community", as the Justice Department here prefers, would be directly contrary to the Congressional intent in passing BMA '66. The District Court in *Jackson* (*supra*, at 1222) concluded on the basis of the legislative history that its evaluation of the convenience and needs of the community could take account of effects outside the trading area. It is clear that here the term, "community," is a generic one and that a broad "public interest" test should be applied. The interest is that of the community, the public at large.

C. The Pro-Competitive Factors—Namely The Ability Of The Merged Bank To Compete With The Largest Banks In The First Banking District—Support The Conclusions Reached By The District Court

After the eleven-day trial and while the district court had the matter under consideration, the New Jersey legislature passed statutes allowing branching in three districts and permitting state-wide holding companies. N.J. S.A. 17:9A-19, N.J.S.A. 17:9A-345. Already the banks in Hackettstown and Washington, the two largest municipalities in Warren County after Phillipsburg, have been taken over by large city banks. Washington Trust with branches in Oxford and White Township has been taken over by National Newark & Essex, a $579 million institution. Peoples Trust Company of New Jersey, with deposits of $502 million, is seeking a merger with the Peoples National Bank of Hackettstown (Int. Ex. 30, A. 581, A. 781). Warren County National Bank, the only remaining bank with offices in Hackettstown and Washington, is to become an affiliate of First National State Bank of New Jersey, an institution with deposits of $659 million. As a result, each of the two banks in Washington and each of the two banks in Hackettstown will be associated with banks having over a half billion in assets apiece.

There is no doubt that the three banks in Phillipsburg, as well as other banks in Warren and Sussex, are fair game for attractive merger proposals by the large banks from Bergen, Passaic, Essex, Hudson and Morris Counties. The only way Phillipsburg banks can meet the convenience and needs of the community to be served is through this merger transaction.

These large banks, unlike the defendant banks, lack the local loyalties which have impelled these two small banks

to seek out better services for the community. As Mr. Greenley from Fidelity Union testified, the city bank will often turn down a participation when money is tight or more profitably invested elsewhere (A. 157-58). These city banks lacking local ties will readily accept deposits through their new branches, but they will funnel the money out of the community to the area of greatest profit. The ultimate decision-making power will remain in the city—outside the local community.

It is this challenge which these two small banks seek to meet. It is this challenge which their future as independent banks requires them to meet. If they can meet that challenge, perhaps other small banks will be encouraged as to their prospects and will resist the allurements of a merger offer from a large city bank.

The district court recognized that, as local industry outgrows the local banks, a substantial part of banking will be done outside the community. The district recognized that "[t]his is not only inconvenient, but economically unhealthy for future development." (A. 697)

The district court also recognized that the merger would have a procompetitive effect if the merged bank stimulated other small banks to become more aggressive in serving the needs of the community (A. 688). The merged bank thus stands in a peculiar position. Its success in providing new services will no doubt provoke a competitive response from other small banks in the area. Its success in resisting the allurements and encroachments of these large city banks will encourage others to maintain their independent status. In this case, not to allow this merger would be substantially anticompetitive.

IV. There Are No Alternatives To Merger To Solve The Managerial Problems Of Second National And To Obtain The Benefits Resulting From The Merger

In *United States* v. *Third National Bank in Nashville*, 390 U.S. 171 (1968), this Court developed the following test in considering the management problems of Nashville Bank:

> . . . we think it was incumbent upon those seeking to merge in this case to demonstrate that they made reasonable efforts to solve the management dilemma of Nashville Bank short of merger with a major competitor but failed in these attempts, or that any such efforts would have been unlikely to succeed. (390 U.S. at 189)

The test is two-pronged; it requires a showing of either reasonable efforts or a showing that such efforts would not be likely to succeed.

In this case both tests were satisfied. Reasonable efforts were made. Any further efforts would clearly have not been successful. As the prior discussion in the Statement shows, reasonable and prolonged efforts were made by William Greenley to attract managerial and officer personnel to Second National. Mr. Greenley looked for over a year, actually took a junior officer from Fidelity Union to Phillipsburg to look the bank over, but was wholly unable to interest anyone in a position at the Phillipsburg bank (A. 152-54, 169-70, 406, 438).*

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* In its discussion of the efforts made the Justice Department wholly ignores the efforts made by Mr. Greenley and considers, as the only effort made, the approach by Mr. Armstrong to a New York banker living in New Jersey. This distortion of the record only shows the limitations of Justice's argument in this regard.

Mr. Armstrong, a director of Second National, sought out an officer of the Chemical Bank of New York on behalf of Second National. However, these efforts, too, failed when the officer indicated his salary requirements (A. 406-08).

Several factors indicate that any further efforts would also have been fruitless. Phillipsburg, itself, is not an attractive town for young men (A. 153, 169, R. 1453). The young men, as Nevins Baxter testified, realize that the smaller the institution, the less the opportunity for future growth personally (A. 506-07). The fringe benefits also cannot compare with those of larger banks (R. 341, 887, A. 170, 392, 451-52, 506-07; Pl. Ex. 52; R. 414, A. 612, p. 134). Officers at the defendant banks were already well aware of the costs of managerial personnel and the proposed specialists through specialized services which send the resumes of officer personnel. They had also discussed the salary schedule with other bankers. Mr. Pursell of Second National felt "we couldn't even touch those salaries." (Pl. Ex. 84; R. 1526, A. 658) For either bank alone, the salaries of the proposed specialists were just out of their reach.*

Asked whether he thought these two banks could rely on internal development to obtain the required officer personnel and specialists, a Hunterdon banker, who had

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* Justice claims that the bank officers admitted no serious efforts to hire were made because of the merger discussions. (See Plaintiff's brief, at 53 citing Pl. Ex. 53, A. 646, 649; Pl. Ex. 54, A. 663-64) The Justice Department is here citing affirmatively the questions it posed, and not the negative response received when the questions were answered. The testimony of William Greenley and the directors of Second National showed that serious efforts were made (A. 152-54, 169-70, 406, 438).

started his development program in 1946, before the reduction in earnings per dollar, asserted:

> I don't think they would make it by themselves. I would certainly hate to come in here and have to try that. (A. 483)

Asked whether he felt aggressive management could be found to move these banks along, he stated:

> Not if you paid them the entire net earnings of that bank, frankly, and with what they would have to put out in addition for other expenses to make the facilities that that fellow would have a chance to go—and he couldn't do it. That one person couldn't. He wouldn't have a chance to go with it. It just isn't in the wood with what stuff will produce today. For a while we had cheap money and not much expense. Now we have got very dear money and very high expense, so the squeeze is actually a little tighter. (A. 483)

The credit squeeze has hobbled these two banks and removed any opportunity for internal growth.

Mr. Greer of Lafayette Trust felt that his bank could not hope to compete unless total footings of $50 million were attained not later than 1972 (A. 400-01). He said:

> I don't believe we will be able to do this on normal growth. I think we will need a merger ourselves in order to accomplish this objective in the time table that I have indicated. (A. 400)

The reduction in earnings per dollar has made it obvious that $24 million and $17 million banks simply lack the leverage to make the investment in the required specialists, that they lack the leverage to continue to grow with their

customer. The management gap is producing a service gap, all to the detriment of the community.

The district court found that the proofs satisfied both tests in *Nashville*. Reasonable efforts were made and any further efforts would most likely not be successful. It found that C&I specialists and trust specialists were "constantly sought by banks and difficult to obtain" (A. 690), and that the cost of their services "[could] be incurred only by banks larger than either PNB or SNB" (A. 690). Responding to the claim of the Justice Department, the court said:

> The government stresses the argument that neither PNB or SNB have made any genuine effort to recruit specialists to head a commercial and industrial loan department or a trust department, but the evidence does establish that such specialists are not easy to find and not likely to be induced to accept employment for a small salary or with a very small bank. It is, however, *clear from the evidence* that neither bank can afford the expense of employing well trained specialists to head a loan and trust department. There was tentative exploration of the possibility of obtaining qualified bank officers which ceased when it became *clear that the expense was out of reach.* (A. 690) (Emphasis added)

Thus, when we look to the particular circumstance of each of these banks, it is clear that merger is the only solution to the managerial problem and the only way in which specialized officers can be obtained.

In many ways, the advantages expected to result from the merger are unique to these two banks operating in

this particular area. Because they are not presently a factor in the provision of certain trust and C & I services, the merger results in benefits unique to these two banks and to the area. Because the area has previously been characterized by a relaxed competitive posture and the area has not benefitted from the aggressive provision of these new services, there will be benefits to the area which would not be nearly as pronounced elsewhere. While the merger will not result in the merged bank becoming a full service commercial bank, nevertheless it does bring its own special set of benefits to the public. The Court here is not dealing with a 20% increase in the lending limit of the bank as was the case in *Nashville,* or the addition of another man to a multi-officer trust or C & I department. Here involved is a qualitative change, not merely a quantitative one. What we have here is the introduction of factors wholly new to these two banks, and, in most instances, sorely lacking in the community. It is considerations such as these which the convenience and needs test looking to the broader contours of the public interest was specifically designed to recognize.

The *Nashville* test, recognizing the special situation of each bank, is a subjective one. It looks to what is reasonable under the particular circumstances of each bank. Here, problems of immediacy require a practical application of the test. The management at both banks is already far beyond the normal retirement age. Replacement is necessary. Meanwhile, large First District banks are already invading the territory of these two small banks. Not content to siphon away the funds of the large depositor, they are now entering the market with branches in an increased effort to attract small and large deposits alike. These special circumstances, an aging

management in the face of a changing law, portend the future of these two small banks, and the future is glum.

Many of the alternatives suggested by the Justice Department, such as the retention of earnings to expand the lending limit, wholly ignore the problem of immediacy. They are mere palliatives with no hope of curing the deep underlying problems facing these two small banks.

Basically, Phillipsburg National and Second National are seeking to obtain a number of conveniences, an increased lending limit, a C & I specialist, a trust officer, automated deposit services, a mortgage specialist, the ability to extend to the public a wider variety of loans, and the ability to enter the field of floor planning. In response, the Justice Department claims that the bank could afford *some* of these services separately, overlooking wholly the problem of whether it is practical to provide the service with limited capital to utilize the service fully.

But merger is the only way to obtain all of the conveniences, and it is the whole that should be weighed in the balance. Interestingly enough, the district court limited its discussion of the proposed conveniences. The ones chosen were those where the benefits clearly could only be obtained through merger and those which, because of the peculiar competitive situation in the area, were of particular benefit to the community.

Much of the Justice Department's argument is directed to the weight of the evidence supporting the district court's findings as to the provision of these various services. It should be noted that although the probable benefit to the community must clearly outweigh any anticompetitive effect of the merger, it is not necessary that the defendants prove that each specific benefit must nec-

essarily follow the merger. These benefits need only be *probable*. 12 U.S.C. 1828(c)(5)(B).

The Justice Department now seeks to extend the *Nashville* test to require that the banks seek a merger with other banks in the area before they decide upon the particular merger now before this Court. The proposal contains its own presumption: that this merger is somehow more anti-competitive than the other mergers it proposes. Without any evidence, that presumption necessarily fails.

The Justice Department now claims that merger with other First District banks should be considered as an "alternative" for these two small banks. This "alternative" was not available in May 1967 when the application was filed. It was not available when the Complaint was filed. It was not available when the trial was held in September and October of 1968. Only in July 1969, more than two years after application to merge was filed, was district-wide merger permitted. Clearly, the Justice Department cannot use the delay imposed on these two small banks to suggest an alternative which was never available at the relevant time.

The proposal also contains extreme practical difficulties. The incursions of large First District banks into the area have already severely reduced the alternatives in Warren County. These small banks cannot afford to pay a premium, while the large banks regularly do offer a premium for the stock of the acquired bank.

Also, a bank seeking to be acquired does not usually advertise its availability broadly. A small bank deciding that a merger is necessary to provide the required services to a growing community surely need not go as a supplicant to each and every one of the banks in the branching district. How does one establish that these

alternatives, other mergers, are not available? If the conservative attitudes of other banks are at all relevant, and clearly they must be, then it is evident on this record that they would not be available for merger. Also, what is the recourse of the remaining merger partner, left with the prospect of a large First District bank moving in?*

The practical difficulties are extreme and, in the light of the problems of immediacy evident here, the present course was clearly the best course if the public interest is to be served. If the proposal of the Justice Department be now adopted, then clearly marriages could only be made in heaven, in an ideal world arriving too late to preserve the future of these two small banks.

Because many other banks in the area have assumed a passive competitive posture, have not aggressively sought C & I business and have even discouraged trust business, the introduction of these services into the area is of paramount importance to the public both to serve a growing need and to stimulate competition. These specialists will directly expand not only the types of services offered, the terms of loans and their number, but also the geographic market presently covered by defendant banks. When related to the correlative changes in the lending limit, the capital structure and loan portfolio of the resulting bank, all of these changes associated with the hiring of specialized officers can be seen as both necessary preliminaries to their hiring and as directly serving

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* The Justice Department claims that Phillipsburg National and Second National could only seek to merge in the face of the incursions by large First District banks if destruction were imminent. This restatement of the failing company doctrine, which parallels the position taken by the Justice Department in *Nashville,* has already been rejected by this Court.

the convenience of the public. Thus, the convenience and needs that will redound to the public benefit here are direct and unique since they turn not only on the size of the present bank and its internal structure, but also on the passive altitude of its competitors in the community. Because the public in the area has waited so long for some of these services, the corresponding benefit to the public is that much clearer.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,

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